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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1094

THE SUPERIOR OIL COMPANY, ET AL

Petitioners,

v.

FEDERAL POWER COMMISSION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BLEED THROUGH

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THE SUPERIOR OIL COMPANY, ET AL
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit, *sub nomine Continental Oil Company, The Superior Oil Company, Mitchell Energy Corporation, Mapco Inc., Petitioners* v. *Federal Power Commission, Respondent,* is reported at 519 F.2d 31 (1975), Appendix A. The Opinion of the Fifth Circuit Court of Appeals denying Petitioner's Petition for Rehearing is unreported, Slip Opinion dated November 3, 1975, Appendix B. Order Nos. 521, 521-A, and 521-B, Appendices C, D, and E, are unreported.

JURISDICTION

The Opinion of the Court of Appeals for the Fifth Circuit wherein Order No. 521 of the Federal Power Commission was affirmed in part and vacated in part was entered

on September 15, 1975 (Appendix A) and its Order denying on Petitioner's Petition for Rehearing was entered on November 3, 1975 (Appendix B). Petitioner invokes the jurisdiction of the Supreme Court of the United States under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED FOR REVIEW

Does the Federal Power Commission have the authority under the Natural Gas Act to gather data with regard to intrastate sales over which it has no jurisdiction?

STATUES INVOLVED

Sections 1, 5, 7, 8, 10, 14, 15, 16, and 19 of the *Natural Gas Act,* 15 U.S.C. 717-717w, herein referred to as the "Natural Gas Act," are involved and are reproduced herein in Appendix F. Section 16 of the Federal Power Act, 16 U.S.C. 825j, is also involved and is reproduced herein in Appendix G.

STATEMENT OF THE CASE

Acting under its rulemaking power and after notice, the Federal Power Commission (FPC) on January 19, 1975, issued Order No. 521 (Appendix C) entitled *Order Establishing Data Collection System to Investigate Rates Charged for Nonjurisdictional Sales of Natural Gas by Natural Gas Companies Subject to the Jurisdiction of the Federal Power Commission,* requiring disclosure by interstate natural gas companies on proposed FPC Form 45 of detailed intrastate sales information, including the names of purchasers, date and location of sale, pressure base, annual sales volume and price terms. In response to the applications of several parties for rehearing, the FPC issued subsequent orders, Order No. 521-A (Appendix D) on February 19, 1975, entitled *Order Denying Stay and Main-*

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taining Non-public Status of Data Pending Rehearing, and Order No. 521-B (Appendix E) on March 17, 1975, entitled *Order Clarifying Order No. 521 and Denying Rehearing.* For convenience, all such orders will be referred to as "the order." Four natural gas companies, including Petitioner, petitioned the United States Court of Appeals for the Fifth Circuit for review of the order under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r, which Court had also granted a stay of the order pending its decision on review. On September 15, 1975, the Fifth Circuit affirmed that portion of Order No. 521 which required jurisdictional companies to disclose fully their intrastate transactions to the FPC, vacated that portion of the order which would make public all details of such information furnished by Petitioners, and vacated the stay order it had previously entered. On November 3, 1975, the Fifth Circuit denied all Petitions for Rehearing, including that of Petitioner wherein it was asserted that the Federal Power Commission was without legal authority to compel a jurisdictional company to submit data with respect to its intrastate sales over which the Federal Power Commission had no jurisdiction. Petitioner files herewith its Petition for writ of Certiorari for review of the September 15, 1975 Order of the Fifth Circuit Court of Appeals affirming that portion of Order No. 521 which requires jurisdictional companies to fully disclose their intrastate transactions to the Federal Power Commission.

SUMMARY OF ARGUMENT

The Natural Gas Act has been in effect nearly forty years. For the first time in its history, the Federal Power Commission, in its Order No. 521, has asserted that it has the legal authority under the Act to investigate and require full disclosure to the Commission of intrastate transactions of jurisdictional companies. Petitioner, a natural gas company

and subject to the jurisdiction of the Federal Power Commission contends that except as expressly set forth in the Act, the Federal Power Commission's authority thereunder is limited to Petitioner's interstate activities and that therefore Order No. 521, to the extent it requires full disclosure of Petitioner's intrastate sales transactions to the Commission, is unlawful. No argument is presented with respect to Petitioner's sought for and granted relief in the Court below prohibiting public disclosure of confidential information protected by statute.

ARGUMENT

A. Section 1(b) of the Natural Gas Act Expressly Precludes Its Application to Interstate Sales.

The basic jurisdiction of the Federal Power Commission is set forth in Section 1(b) of the Natural Gas Act[1] by an affirmative declaration of application in the first clause thereof, which reads as follows:

> "The provisions of this Act *shall apply* to the *transportation* of natural gas in interstate commerce, to the *sale* in interstate commerce of natural gas *for resale* for ultimate public consumption for domestic, commercial, industrial or any other use, and to *natural gas companies* engaged in such transportation or sale . . ." (Emphasis added.)

Petitioner is a producer of oil and gas and engages in activities in connection with the sale of each, both within and without interstate commerce. As such, it is, from time to time, subject to the regulatory power of Congress as expressed by the affirmative wording of the Act, but only *when, where and at such times* as it is engaging in interstate activities. For then it becomes a "natural gas company,"

[1] 15 U.S.C. 717(b)

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as defined in the portion of Section 1(b) quoted above, and is therefore subject to the jurisdiction of Congress' agent, the Federal Power Commission.

But Petitioner also engages in many activities which are strictly *intrastate* in character, such as the transportation and sale of oil and gas in the same state where production occurs. As to these activities, the Natural Gas Act has no application because the last clause of Section 1(b) expressly declares that the Act:

> "*. . . shall not apply to any other transportation or sale* of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Emphasis added.)

In its Opinion below, the Fifth Circuit declared that the argument that FPC jurisdiction over "natural gas companies" cannot extend beyond interstate activity is without merit. Yet, the FPC can only have jurisdiction over those activities to which the Natural Gas Act applies, and by definition, it applies only to *interstate* activities. The Fifth Circuit failed to heed the Supreme Court's interpretation of the last clause of Section 1(b) in *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*[2] wherein it declared:

> "The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply *to any other . . . sale . . .*' (Emphasis added.) Those words plainly mean that the Act shall not apply to any sales other than sales 'for

[2] 332 U.S. 507, 68 S.Ct. 190 (1947)

> resale for ultimate public consumption for domestic, commercial, industrial or any other use.' Direct sales for consumptive use of whatever sort were excluded." (Opinion, P. 195.)

And consistent with the above, the Supreme Court made the following statement in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*[3] with respect to a non-jurisdictional activity of a natural gas company subject to the Natural Gas Act:

> "We cannot attribute to Congress the intent to grant such far reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power." (Opinion, P. 1260, right column.)

> "As we have held above that the transfer of undeveloped gas leases is an activity related to the production and gathering of natural gas and beyond the coverage of the Act, *the authority of the Commission cannot reach the sales.*" (Emphasis added. Opinion, P. 1261, left column.)

B. "Need" Alone Cannot Extend Jurisdiction Congress Has Not Granted.

The Fifth Circuit seems to justify its view on the basis that if the FPC is to carry out its legitimate regulatory functions effectively, then it "needs" to have the non-jurisdictional sales information from jurisdictional companies. However, in doing so, the Court overlooked its own declaration in *Louisiana Power and Light Company* v. *United Gas Pipe Line Co.*[4]

> "Even conceding that FPC powers are as broad as it asserts, no amount of *need* alone can create federal

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[3] 337 U.S. 498, 69 S.Ct. 1251 (1949)

[4] 456 F.2d 326 (CCA5-1972)

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agency power if Congress has not expressly or impliedly granted it." (Emphasis added. Opinion, P. 335.)

Only passing reference should be made to the fact that the case on appeal *(United Gas Pipe Line Company* v. *Louisiana Power and Light Company)*[5] was reversed by the Supreme Court. Nonetheless, the Court cited with approval the Fifth Circuit's statement to the effect that a *need* for federal regulation does not establish FPC jurisdiction that Congress has not granted.

C. Sections 4, 5, 7 and 16 Do Not Extend the Basic Jurisdiction of the Natural Gas Act Beyond That Defined in Section 1(b).

In its Opinion, the Fifth Circuit makes reference to Sections 4, 5 and 7 of the Act as authorizing the FPC to oversee the justness and reasonableness of interstate rates and to assure continued, reliable service. Petitioner does not disagree with this conclusion, per se; however, it should be pointed out that with reference to these specific sections the Supreme Court declared in *FPC* v. *Panhandle, supra:*

> "Nothing in the sections [4, 5 and 7 of the Natural Gas Act] indicate that the power given to the Commission over natural-gas companies by § 1(b) could have been intended to swallow all of the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce. The repetition of the words *"subject to the jurisdiction"* makes clear to us the intent to keep the Commission's hands out of the excepted local matters. The same answer applies to Petitioner's [FPC's] argument that § 16 gives it authority to stop sales of leases. The power to do things appropriate to carry out the provisions of the Act can hardly be taken to rescind a prohibition against certain actions." (Emphasis added. Parenthetical material inserted. Opinion, P. 1258.)

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[5] 406 U.S. 621, 92 S.Ct. 1827 (1972)

In accordance with the above, and with specific reference to Section 16 of the Act, is *American Smelting & Refining Co.* v. *Federal Power Commission*,[6] wherein the District of Columbia Court of Appeals declared:

> "The Commission's power . . . is not born of emergency. Rather, it is based upon the statutory authorization to perform 'any and all acts' necessary or appropriate for the implementation of the Natural Gas Act. As we have stated before, of course, section 16 does not of itself grant independent powers but merely provides for the implementation of the core sections of the Natural Gas Act." (Citations omitted. Opinion, P. 933.)

D. Section 5(a) Refers Only to Interstate Sales and Transportation of Natural Gas.

Section 5 of the Act is entitled "Fixing Rate and Gas Charges; Determination of Cost of Production or Transportation." Section 5(a) thereof is expressly limited to Commission determinations with regard to the sale and transportation of natural gas which is *subject to the jurisdiction of the Commission*, and therefore provides no legal authority to extend FPC jurisdiction to *intrastate sales*. If there should be any doubt, the District of Columbia Court of Appeals recently declared in *Texaco, Inc.* v. *Federal Power Commission*:[7]

> "*Intrastate sale prices* (of natural gas) are at no point subject to regulation by the Commission." ("Intrastate" by the Court; other emphasis and parenthetical material added. Opinion, P. 421, right column.)

E. Section 5(b) Exemption for Intrastate Information Is Limited to Cost Data.

Section 5(b) of the Act authorizes the Commission to investigate and determine only the *cost* of production or

[6] 494 F.2d 925 (CADC-1974)
[7] 474 F.2d 416 (CADC-1972)

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transportation not otherwise subject to the rate making authority of the Commission. Section 5(b) states:

> "The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate the *cost* of the production or transportation of natural gas by a natural gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas." (Emphasis added.)

The reference in Section 5(b) to *costs*, not sales, of certain nonjurisdictional activities of natural gas companies is obviously specific and most certainly was deliberately so worded by Congress. Why? Because at the time the Natural Gas Act was enacted, it was well known that most natural gas companies (as defined by the Act) engaged in many nonjurisdictional activities, and therefore it was imperative for the Commission to be able to determine the costs attributable thereto in order to effectively establish "just and reasonable rates" with respect to jurisdictional activities. The Tenth Circuit explained the rationale in *Colorado Interstate Gas Company* v. *Federal Power Commission*,[8] as follows:

> "Where . . . a natural gas company is engaged in an integrated business, part of which is subject to regulation and part of which lies beyond the reach of the regulatory jurisdiction of the Commission, some separation of the property, capital, and revenue is essential in order that regulation may be confined to its permitted field." (Opinion, P. 959, left column.)

And, the Supreme Court settled the matter in *Panhandle Eastern Pipe Line Co., et al* v. *Federal Power Commission, et al*[9] by declaring:

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[8] 142 F.2d 943 (CCA10-1944)
[9] 324 U.S. 635, 65 S. Ct. 821 (1945)

"We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. Otherwise the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Commission would transgress the jurisdictional lines which Congress wrote into the Act." (Opinion, P. 825, left column.)

F. Sections 8 and 10 of the Natural Gas Act Refer Only to Records and Reports Relating to Interstate Activities.

Section 8 of the Act[10] is directed to the keeping of accounts, records, and memoranda *of natural gas companies as defined in the Act and subject to the Commission's jurisdiction.* Such accounts, records and memoranda and the right to inspect same are clearly confined to the regulated functions of natural gas company operations. There is no authority under Section 8 of the Act, *supra,* for the Commission to compel producers to make and keep records of intrastate activities any more than it can compel producers to engage or not to engage in such activities. A fortiori, the Commission does not have the right to inspect and examine intrastate records under Section 8 of the Act, *supra,* whether pertaining to solely intrastate sales of natural gas or other nonjurisdictional matters.

Section 10 of the Act,[11] *supra,* covers periodic and special reports by natural gas companies. The contents of such reports under Section 10(a) are strictly related to accounting and cost matters pertaining to the regulated natural gas activities of reporting companies. This section in no way suggests that the Commission is permitted to require the filing of periodic reports pertaining to un-

[10] 15 U.S.C. 717g
[11] 15 U.S.C. 717i

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regulated intrastate activities. The section does not relate to the reporting of contract and price information pertaining to nonjurisdictional sales. The only reports contemplated by Section 10 of the Act, *supra*, are those of a regulated cost nature necessary for the maintenance of regulatory accounting records.

G. Section 14 Has Never Been Amended to Provide the Authority the Commission Seeks to Exercise in Order No. 521.

Section 14(a) of the Act,[12] *supra*, provides that the Commission may investigate facts and circumstances pertaining to violation and, or, enforcement of the Act, and rules and regulations promulgated thereunder, or to aid in obtaining information to serve as a basis for recommending further legislation to Congress. Significantly, and in contrast to Section 5(b), there is no express provision in Section 14(a) authorizing the Commission to go beyond its jurisdictional limits, as prescribed by Section 1(b) of the Act, in performing the functions authorized thereunder. As the entire Act was drawn with such meticulous care to separate, and to keep separate, the respective regulatory functions of the federal government and the several states, the only logical conclusion is that such authority was denied the Commission.

It would seem that the Commission has been of that opinion for many years. In Commissioner Moody's dissenting opinion (joined by Commissioner Brooke) to Order No. 521,[13] he refers specifically to the Commission's 1959, 1962, 1966, and 1972 Annual Reports to Congress where, in each instance, the Commission has recommended amendment of the Natural Gas Act in order to broaden its in-

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[12] 15 U.S.C. 717m(a)

[13] Order No. 521, P. 13, Appendix C

vestigatory and information gathering powers similar to that which it enjoys under the Federal Power Act.[14] To date, Congress has not seen fit to pass such amendment, and yet the FPC, through Order No. 521, seeks to exercise that very power which Congress has thus far denied it. With regard to the latest such report, Commissioner Moody declared in his dissenting opinion:

> "Finally, in its 1972 Report to Congress, the Commission, under the chairmanship of the Honorable John N. Nassikas, proposed:
>
> > ' . . . . the Commission has in prior sessions of Congress proposed the adoption of a bill . . . which would enlage the Commission's authority under the Natural Gas Act to collect, publish and disseminate information with respect to that which it already possesses regarding the electric utility industry under the Federal Power Act. The Commission considers that such added authority would enable it to act more effectively on the basis of more complete information with a view to meeting the serious gas supply problems with which the United States is now confronted and which will exist for an indefinite period in the future.' (P. 8.)
>
> "I choose the foregoing as illustrative, since it appears that the Commission has made the same legislative recommendations in every annual report to Congress for at least the past 20 years.
>
> "For the Commission now to interpret the Natural Gas Act in a manner contrary to a 20-year pattern of interpretation is indefensible; particularly so when the new interpretation would reach a result totally inconsistent with the substantive limitations placed on the Commission's scope of authority in Sections 1(b) and 1(c) of the Act and the narrow exemption to such limitation provided in Section 5(b) concerning costs of

[14] 16 U.S.C. 825

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nonjurisdictional activities. Irrespective of the 'necessary or appropriate' phrase in Section 10 and in other subsidiary sections of the Act, this phrase cannot logically be employed in a manner which would undermine the overall design Congress had in mind when enacting the Natural Gas Act of 1938."

H. Prolonged Failure to Exercise a Newly Asserted Power Is An Admission the Power Never Existed.

Without adequate explanation, the Fifth Circuit refused to attach any significance to the failure of the FPC to exercise its "power" (to compel production of nonjurisdictional sales data) prior to promulgating Order No. 521, stating:

> "The present shortage of natural gas is unique. The only deduction we make from the fact that this order is novel is that the FPC has not found it imperative to correlate intrastate sales of interstate rate-making until now." (Opinion, P. 34.)

Yet, in *F.P.C. v. Panhandle, supra*, under similar circumstances, the Supreme Court attached considerable importance to the prolonged failure of the FPC to use a newly asserted power:

> "The District Court found as a fact, and the finding is undisputed by the Commission, that, 'It has been the practice in the natural gas industry for companies to trade freely in gas leases, and the Commission has never heretofore asserted the right to regulate transfers of such leases.' Thus for over ten years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that *the Commission did not believe the power existed.* In the light of that history we should not by an extravagant, even if abstractly possible, mode of interpretation push powers granted over transportation and rates so as to include

CONCLUSION

Wherefore, for the reasons set forth above, Petitioner prays that that portion of the judgment of the Court of Appeals affirming Order No. 521 to the extent it requires jurisdictional companies to disclose fully their intrastate natural gas transactions to the FPC be reversed.

Respectfully submitted,

W. B. WAGNER, JR.
PAT F. TIMMONS
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Attorneys for Petitioner
The Superior Oil Company

By .....
PAT F. TIMMONS

CERTIFICATE OF SERVICE

The within Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on all counsel of record by mailing three (3) copies thereof, air mail postage prepaid, in accordance with Rule 33(1) this 31st day of January, 1976, and upon the Solicitor General of the United States in accordance with Rule 33(2)(a), who acknowledges receipt of same.

.....
Attorney for Petitioner

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APPENDICES

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APPENDIX A

CONTINENTAL OIL COMPANY,
THE SUPERIOR OIL COMPANY, MITCHELL ENERGY CORPORATION, AND MAPCO INC.,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

Nos. 75-1496, 75-1748, 75-1498, 75-1740, 75-1519, 75-1765 and 75-2232.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Sept. 15, 1975.

Interstate natural gas companies petitioned for review of order of Federal Power Commission requiring disclosure by them of detailed intrastate sales information, including the names of purchasers, date and location of the sale, pressure base, annual sales volume and price terms. The Court of Appeals, Clark, Circuit Judge, held that the Commission could require regulated companies to furnish information about their unregulatable intrastate activity to facilitate the discharge of the agency's duty, but that public disclosure of the information acquired went too far.

Affirmed in part, and vacated in part.

1. Gas (Key) 14.3(2)

In view of fact that interstate rates must be fixed with a clear vew of prices and terms prevailing in intrastate market, that the two markets compete for natural gas which is

in short supply, and that those regulating the public interstate market must know the private intrastate price structure if their regulations are to function effectively, Federal Power Commission's jurisdiction over interstate natural gas companies extends beyond interstate activity. 5 U.S.C.A. § 552; Natural Gas Act, §§ 1(b), 4, 5, 5(b), 7, 8, 10, 14(a), 15, 16, 15 U.S.C.A. §§ 717(b), 717c, 717d, 717d(b), 717f, 717g, 717i, 717m(a), 717n, 717o.

2. Gas (Key) 14.3(2)

Mere disclosure by interstate natural gas companies of details of intrastate sales of natural gas is not regulation of nonjurisdictional sales by the Federal Power Commission. 5 U.S.C.A. § 552; Natural Gas Act, §§ 1(b), 4, 5, 5(b), 7, 8, 10, 14(a), 15, 16, 15 U.S.C.A. §§ 717(b), 717c, 717d, 717d(b), 717f, 717g 717i, 717m(a), 717n, 717o.

3. Gas (Key) 14.3(2)

Federal Power Commission has authority to require regulated interstate natural gas companies to furnish detailed information about their unregulatable intrastate activity to facilitate discharge of the Commission's investigative and fact gathering duties. 5 U.S.C.A. § 552; Natural Gas Act, §§ 1(b), 4, 5, 5(b), 7, 8, 10, 14(a), 15, 16, 15 U.S.C.A. §§ 717(b), 717c, 717d, 717d(b), 717f, 717g, 717i, 717m(a), 717n, 717o.

4. Gas (Key) 14.3(2)

Federal Power Commission's inquiries into nonjurisdictional sales of jurisdictional companies are not limited to costs of production and transportation of gas. Natural Gas Act, §§ 5(b), 14(a), 15 U.S.C.A. §§ 717d(b), 717m(a).

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5. Gas (Key) 14.3(2)

Whether exemption of small companies would affect reliability of data about intrastate activity to be acquired from interstate natural gas companies was a matter within discretion of Federal Power Commission. Natural Gas Act, § 14, 15 U.S.C.A. § 717m; Federal Power Act, § 311, 16 U.S.C.A. § 825j.

6. Records (Key) 14

In order to bring a matter other than a trade secret within "trade secrets" exemption to Freedom of Information Act, it must be shown that the information is commercial or financial, obtained from a person, and privileged or confidential. 5 U.S.C.A. § 552(b)(4).

7. Records (Key) 14

Commercial or financial matter is "confidential" for purposes of "trade secrets" exemption to Freedom of Information Act if disclosure of the information is likely to impair the government's ability to obtain necessary information in the future, or cause substantial harm to the competitive position of the person from whom the information was obtained. 5 U.S.C.A. § 552(b)(4).

See publication Words and Phrases for other judicial constructions and definitions.

8. Records (Key) 14

"Trade secrets" exemption to Freedom of Information Act may be invoked for benefit of person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position. 5 U.S.C.A. § 552(b)(4).

9. Records (Key) 14

In view of "trade secrets" exemption to Freedom of Information Act, all details of intrastate sales information furnished by interstate natural gas companies to Federal Power Commission could not be made public, and the rights of those required to divulge must be protected. 5 U.S.C.A. §§ 552, 552(b)(4); Natural Gas Act, § 1(b), 15 U.S.C.A. § 717(b).

Tom Burton, Houston, Tex., for petitioners in No. 75-1496.

W. B. Wagner, Jr., Pat F. Timmons, Houston, Tex., for petitioners in Nos. 75-1740 and 75-1498.

Homer J. Penn, Houston, Tex., for petitioners in Nos. 75-1765 and 75-1519.

Joseph C. Johnson, Tom Burton, Houston, Tex., for Petitioners in No. 75-1748.

William W. Ross, Toni K. Golden, Washington, D. C., Eugene G. Bell, Royse M. Parr, Tulsa, Okla., for petitioners in No. 75-2232.

Kirk W. Weinert, C. Fielding Early, Jr., Roger L. Brandt, Houston, Tex., for intervenor Texaco, Inc.

George C. Bond, Kenneth L. Riedman, Jr., Los Angeles, Cal., Platt W. Davis, III, Washington, D. C., for intervenor Union Oil Co.

Frank P. Saponaro, Jr., Washington, D. C., for Mitchell Energy Corp.

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Leo E. Forquer, Gen. Counsel, George W. McHenry, Jr., Sol., Thomas M. Walsh, Atty., Federal Power Com'n, Washington, D. C., for respondent in No. 75-1496.

Drexel D. Journey, Gen. Counsel, George W. McHenry, Jr., Sol., Federal Power Com'n, Washington, D. C., for respondent in Nos. 75-1740, 75-1765, 75-1748 and 75-2232.

Leo E. Forquer, Gen. Counsel, George W. McHenry, Jr., Sol., Federal Power Com'n, Washington, D. C., for respondent in Nos. 75-1498 and 75-1519.

Petitions for Review of Orders of the Federal Power Commission (Texas Case).

Before BELL, CLARK and RONEY, Circuit Judges:

CLARK, Circuit Judge:

Acting under its rulemaking power and after notice, the Federal Power Commission (FPC) issued Order No. 521, requiring disclosure by interstate natural gas companies of detailed intrastate sales information, including the names of purchasers, date and location of the sale, pressure base, annual sales volume and price terms.[1] Four natural gas companies[2] petition for review of the order. While acknowl-

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[1] Order No. 521 issued January 9, 1975 is entitled *Order Establishing Data Collection System to Investigate Rates Charged for Nonjurisdictional Sales of Natural Gas by Natural Gas Companies Subject to the Jurisdiction of the Federal Power Commission.* Also under review are subsequent orders, issued in response to the petitions of several parties for rehearing, No. 521-A, *Order Denying Stay and Maintaining Non-public Status of Data Pending Rehearing,* (issued February 19, 1975) and Order No. 521-B, *Order Clarifying Order No. 521 and Denying Rehearing,* (issued March 17, 1975). These orders will be referred to collectively as "the order."

[2] The petitioners in these consolidated causes are The Superior Oil Company, Continental Oil Company, Mitchell Energy Corporation and Mapco, Inc. Intervention by Union Oil Company of California and Texaco, Inc. was allowed by this court. We also granted a stay of the order pending completion of this proceeding.

edging that their interstate gas sales are subject to FPC regulation, petitioners challenge the Commission's authority to obtain such intrastate sales information. Alternatively they assert that if such authority exists, the information they file cannot be made public under the Freedom of Information Act (FOIA). We hold that the Commission can require regulated companies to furnish information about their unregulatable intrastate activity to facilitate the discharge of the agency's duty, but that public disclosure of the information acquired goes too far. We vacate the requirement of public disclosure.

I. AUTHORITY OF FPC

The attack on the authority of the FPC to order disclosure of information relating to intrastate sales of natural gas is based on language expressly excluding such sales from regulation under the Natural Gas Act. Section 1(b) of the Act[3] states:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[1, 2] The Supreme Court said in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516, 68 S.Ct. 190, 194, 92 L.Ed. 128 (1947): "Three things and three only Congress drew within its own regulatory power delegated by the Act to its agent, the

[3] 15 U.S.C. § 717(b).

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Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." Clearly, the FPC has jurisdiction over the petitioners here under the third category. Their argument that the FPC's jurisdiction over them cannot extend beyond interstate activity is without merit. Interstate rates must be fixed with a clear view of the prices and terms prevailing in the intrastate market. The two markets compete for natural gas which is in short supply. Those regulating the public interstate market must know the private intrastate price structure if their regulations are to function effectively. Moreover, the mere disclosure of details of intrastate sales of natural gas is not regulation of nonjurisdictional sales. The acquisition of sales and pricing information *per se (see Part II infra)* has not been shown to have any potential impact on intrastate sales.

[3] Sections 4, 5 and 7 of the Act[4] authorize the FPC to oversee the justness and reasonableness of interstate rates and to assure continued, reliable service. Section 14(a)[5] authorizes the FPC to conduct investigations to aid in enforcement of the Act. The investigation of intrastate market conditions contemplated by the order is within the ambit of this authority, because the information is essential to effective ratemaking. Other provisions of the Act

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[4] 15 U.S.C. §§ 717c, 717d and 717f.

[5] 15 U.S.C. § 717m(a) provides in pertinent part that,

"[t]he Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress."

provide additional and complementary authority. Section 5(b)[6] allows the Commission to investigate and determine the cost of production or transportation of natural gas even where it has no authority to set rates. Section 8[7] is directed to keeping accounts, records and memoranda of companies subject to the FPC's jurisdiction; Section 10[8] covers periodic and special reports by natural gas companies. Section 15[9] provides for establishment of formal hearings and investigations. Section 16[10] is a general provision giving the Commission power to perform any and all acts and to make such orders, rules and regulations as may be necessary or appropriate to carry out the provisions of the Act.

Order No. 521 finds that the information sought is vital to effective administration of the Natural Gas Act and that it will serve a regulatory need, especially with regard to rate making responsibilities in this language: "Because of the existing gas shortage and the current national energy crisis, it is imperative that the Commission have current information concerning sales of natural gas which are not subject to its ratemaking jurisdiction in order that it may formulate adequate policies concerning sales of natural gas in interstate commerce and for other regulatory purposes." The order also takes note of the following matters. Intrastate rates for new gas are increasing rapidly, thus making a scarce commodity even scarcer in the interstate market and compounding the difficulty interstate pipelines have experienced in contracting for needed supplies. No federal or state agency now collects intrastate sales information on a comprehensive basis. A continuing source of reliable in-

[6] 15 U.S.C. § 717d(b)
[7] 15 U.S.C. § 717g.
[8] 15 U.S.C. § 717i.
[9] 15 U.S.C. § 717n.
[10] 15 U.S.C. § 717o.

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formation on intrastate sales will assist the FPC in review of limited term and emergency sales and enable it to set rates that are adequate to secure the needed supplies now and in the future.

[4] The petitioners assert additionally that the specific grant of power to investigate and determine costs of production and transportation of gas which cannot be regulated under § 5(b), reflects a Congressional intent to limit the FPC's inquiries into nonjurisdictional sales of jurisdictional companies to such cost considerations. We disagree. As stated above, rather than limiting the FPC investigative and fact-gathering function, this section provides collateral support to the FPC's § 14(a) authority to enter the order here on review. It has been recognized that non-cost factors may be considered in setting rates, *see Permian Basin Area Rate Cases,* 390 U.S. 747, 815, 88 S.Ct. 1344, 1385, 20 L.Ed.2d 312 (1968), and *Panhandle Eastern Pipe Line Co.* v. *F.P.C.,* 324 U.S. 635, 65 S.Ct. 821, 89 L.Ed. 1241 (1945). If the FPC lacked the ability to investigate any intrastate sales factor other than costs incurred by companies within its jurisdiction, this duty could not be accomplished.

[5] In the past years the FPC has recommended to Congress that its investigatory powers under § 14 be enlarged to include powers similar to those given it under § 311 of the Federal Power Act.[11] Petitioners contend this is an admission that it lacks authority to pass the instant order. It is not. Section 311 allows the FPC to investigate nonjurisdictional sales of nonjurisdictional companies. Order No. 521 is solely directed to companies which are clearly subject to FPC jurisdiction. We likewise refuse to attach significance to the failure of the FPC to exercise this power previously. The present shortage of natural gas is unique.

[11] 16 U.S.C. § 825j.

The only deduction we make from the fact that this order is novel is that the FPC has not found it imperative to correlate intrastate sales to interstate ratemaking until now. Finally, we reject the contention that the data to be acquired will not be reliable because small companies are exempted. This is a matter within FPC discretion.

II. PUBLIC DISCLOSURE

Alternatively, the petitioners maintain that the information should not be made public. The thrust of their argument is that this information comes within the "trade secrets" exception to the Freedom of Information Act, (FOIA) which provides: "(b) This section does not apply to matters that are — . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . ."[12]

[6, 7] *National Parks and Conservation Association* v. *Morton*, 162 U.S. App. D.C. 223, 498 F.2d 765 (1974) aids in interpreting this section. "In order to bring a matter (other than a trade secret) within this exemption, it must be shown that the information is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential." 498 F.2d at 766. For the purposes of the FOIA, a corporation comes within the definition of person,[13] and since the information is commercial or financial, the dispute comes down to whether the information is confidential. "[C]ommercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information

[12] 5 U.S.C. § 552(b)(4).
[13] 5 U.S.C. § 551(2).

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was obtained." *National Parks and Conservation Ass'n* v. *Morton*, 498 F.2d at 770.

The information to be furnished is detailed — a contract by contract, field by field exposition of the petitioners' product marketing. Prices, names of purchasers, terms and times of price renegotiation must be disclosed. The likelihood that delivery of these intimate facts to petitioners' competitors would be harmful is apparent. Not only could it affect sales by enabling competitors to learn contract termination dates but it also affects product acquisition. Natural gas companies lease drilling and exploration rights from owners of mineral rights. The latest leasing innovation is the "market value" lease, under which the royalty payment to a mineral lessor is based on market value of the gas rather than the proceeds of every specific sale. Disclosure of individual field prices will disrupt lessor-lessee relationships where the market value is less than the highest price reported in the area. The compilation and disclosure to petitioners' competitors, purchasers and suppliers of information as to extent of supply and competitive prices in each market area would alter industry custom and existing relationships to the disadvantage of petitioners' competitive positions.

The FPC maintains that the information is not confidential. They point to the fact that at least one state requires public disclosure of data of the type required and that many newspapers and trade journals publish intrastate sales information. This proof falls short of carrying the contention that the broad reach of Order No. 521 is harmless to the business interests of those it affects. If what must be revealed is already available from other sources, the order would be of questionable validity.

[8] The FPC urges that the exemption means no more than that an agency cannot be compelled to release confi-

dential information, and does not command that they must withhold it. We hold, without reaching any situation broader than that presented, that this contention is without merit here. *National Parks and Conservation Ass'n* v. *Morton* decided that even where an agency had no interest in keeping submitted information secret, "[t]he exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position." 498 F.2d at 770.[14]

[9] This is not to say, however, that the information gathered must be kept from the public altogether. Only confidential information is protected. To the extent that confidentiality can be secured by composite disclosure and by deletion of the filing party's name and other identifying characteristics, petitioners do not dispute its release. *See National Cable Television Ass'n, Inc.* v. *FCC*, 156 U.S.App. D.C. 91, 479 F.2d 183, 195 (1973). The only requirement in today's case is that the rights of those required to divulge be protected. In *Evans* v. *Dept. of Transportation*, 446 F.2d 821 (5th Cir. 1971), we explained the necessity of balancing public and private interests in interpreting the FOIA. Assurance as to accuracy in the determination of volume and pricing of intrastate sales, not the identity of the parties to each such transaction, is the critical public factor. An impersonal disclosure of the data filed will protect both interests. We leave to FPC discretion the details of implementing public disclosure which will accord with these views.

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[14] We pretermit as unnecessary determinations of the petitioners' further arguments against disclosure: (1) that disclosure would be a taking of proprietary interests in violation of the Fifth Amendment, and (2) that submission of the information would cause petitioners to violate the antitrust laws.

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We affirm the portion of Order No. 521 which requries jurisdictional companies to disclose fully their intrastate natural gas transactions to the FPC. We vacate that portion of the order which would make public all details of such information furnished by petitioners. The stay order previously entered is vacated.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 75-1196, 75-1748, 75-1498, 75-1740,
75-1519, 75-1765 and 75-2232.

THE SUPERIOR OIL COMPANY, ET AL,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL POWER COMMISSION (TEXAS CASE)

ON PETITION FOR REHEARING
(November 3, 1975)

Before BELL, CLARK and RONEY, Circuit Judges.

IT IS ORDERED that the petition for rehearing filed on behalf of Superior Oil Co. in the above entitled and numbered causes be and the same is hereby denied.

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APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(18 C.F.R. § 260.20)

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

Investigation of Rates Charged For Nonjurisdictional Sales Of Natural Gas By Natural Gas Companies Subject To The Jurisdiction Of The Federal Power Commission	Docket No. RM74-12

ORDER NO. 521

ORDER ESTABLISHING DATA COLLECTION SYSTEM TO INVESTIGATE RATES CHARGED FOR NONJURISDICTIONAL SALES OF NATURAL GAS BY NATURAL GAS COMPANIES SUBJECT TO THE JURISDICTION OF THE FEDERAL POWER COMMISSION

(Issued January 9, 1975)

On January 30, 1974, we issued a notice of proposed rulemaking, 39 F.R. 4671 (February 6, 1974) pursuant to the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (1970) and Sections 5, 8, 10, 14, 15, and 16 of the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (1970) for the purpose of establishing a data collection system designed to investigate rates charged by jurisdictional natural gas companies for sales of natural gas which were not subject to Commission jurisdiction made pursuant to contracts executed on or after January 1, 1974.

PROCEDURAL ISSUES

The comments filed in response to the notice of proposed rulemaking, along with the special concurrence of Commissioner Moody to that notice, were generally related to questions in three principal areas: (1) whether the Commission has the legal authority to compel the reporting of nonjurisdictional sales by jurisdictional companies, (2) if such authority does exist, whether the exclusion of certain classes of companies from the reporting requirements, as outlined in the notice of proposed rulemaking fulfills the purposes the Commission expressed as the reason for instituting the investigation, and (3) whether the data gathered as a result of the investigation will be useful to the Commission in the performance of its statutory duty?

(A) LEGAL AUTHORITY

The rulemaking as proposed, includes only those companies which are subject to the jurisdiction of the Commission pursuant to Section 1(b) of the Natural Gas Act,[1] as delineated by the Supreme Court in *Phillips Petroleum Company* v. *Wisconsin.*[2] There is no argument by the respondents on this point. Certain respondents do, however, contest the authority of the Commission to require admittedly jurisdictional companies to submit to the Commission information relating to sales which are exempt from Commission regulation by the provision of Section 1(b) of the Act[3] which states that only interstate sales for resale come within the purview of the Commission authority.

Despite the allegations made by some respondents that the Commission has no authority to obtain the data described in the notice, the plain meaning of Sections 5,

[1] 15 U.S.C. §717b.
[2] 347 U.S. 672 (1954).
[3] 15 U.S.C. § 717b.

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8, 10, 14, 15 and 16 of the Act clearly vests this right in the Commission. To state otherwise is to misinterpret the reasons underlying the proposed investigation.

Section 1(a) of the Act represents the findings of the Congress that the interstate sale and transportation of natural gas is affected with a public interest that requires federal regulation. Subsequent sections, particularly 4, 5 and 7, set forth the specific methods by which this regulation will be accomplished. The basic reason for the promulgation of this investigation is to assist the Commission in the performance of its duties with regard to this regulation of interstate sales and transportation, and not to attempt the regulation of matters which are outside the scope of the authority conferred upon the Commission by the Act. The development which has made this investigation necessary at this time is the natural gas shortage, with its concomitant rise in demand, thereby fueling the growth of an ever-expanding intrastate market in the producing states.

The existence of the gas shortage has been recognized both by the Commission[4] and the Supreme Court.[5] In addition, it has been established that in ratemaking the Commission must look beyond the costs involved to also consider various noncost factors, such as supply considerations and intrastate rates.[6] The interrelationship of the interstate regulated market with the unregulated intrastate

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[4] Statement Of Policy Relating To Optional Procedure For Certificating New Producer Sales Of Natural Gas, Docket No. R-441, Order No. 455, 48 F.P.C. 218 (1972), *as amended*, Order No. 455-A, 48 F.P.C. 477 (1972), *aff'd in part*, John E. Moss, *et al.* v. F.P.C., ... F.2d ..... (D.C. Cir., August 15, 1974).

[5] F.P.C. v. Louisiana Power & Light Co., 406 U.S. 621, 626 (1972).

[6] Southern Louisiana Area Rate Cases (Austral Oil Co.) v. F.P.C., 428 F.2d 407, 441-42 (5th Cir. 1970), *cert. denied*, Municipal Distributors Group v. F.P.C., 400 U.S. 950 (1970).

market was repeatedly brought to the Commission's attention recently when most of the respondents to Opinion No. 699,[7] the nationwide ratemaking, petitioned the Commission to reinstitute the emergency and limited term procedures which had been eliminated by Opinion No. 699. The purpose of this proposed change, and one of the principal reasons that we acceded to this request[8] was that the emergency and limited term procedures provided a viable method whereby gas that would otherwise go to the intrastate market could be obtained for the interstate market.[9] Obviously, when we make our statutorily required review of the rates proposed for emergency or limited term sales, accurate information on the relevant intrastate market is not only helpful but vital. And in a more general sense, with respect to all our ratemaking duties, and considering the widespread effects of the gas shortage, such data as is required herein is essential to satisfy the responsibilities placed upon us by the Natural Gas Act.

In order to carry out the duties imposed on this Commission by Section 1 of the Act, certain subsequent sec-

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[7] Opinion And Order Prescribing Uniform National Rate For Sales Of Natural Gas Produced From Wells Commenced On Or After January 1, 1973, And New Dedications of Natural Gas To Interstate Commerce On Or After January 1, 1973, Opinion No. 699, Docket No. R-389-B, ... F.P.C. ..... (issued June 21, 1974), *as amended*, Opinion No. 699-A, ... F.P.C. ..... (issued August 2, 1974), *rehearing granted*, ... F.P.C. ..... (issued August 2, 1974).

[8] Opinion And Order On Rehearing Reinstating And Amending The Emergency Sales Provisions Of Section 157.29 (18 C.F.R. § 157.29) And The Limited Term Certificate Authority Of Section 2.70(b)(3) (18 C.F.R. § 2.70(b)(3)) And Reserving Decision On The Merits Of All Other Issues Raised By Petitions For Rehearing Of Opinion No. 699 For Further Consideration, Opinion No. 699-B, Docket No. R-389-B, ... F.P.C. ..... (issued September 9, 1974).

[9] *Id.* at 4.

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tions grant the Commission the powers necessary to effectuate these responsibilities. For example, Section 14(a)[10] provides that:

> [t]he Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order . . . *aid in the enforcement of the provisions of this act* or in prescribing rules or regulations thereunder . . . (emphasis added)

Subsection (c) of Section 14[11] gives the Commission the power through subpoena to compel the submission of information deemed relevant or material to the inquiry. Similarly, Section 5(b)[12] states:

> [t]he Commission upon its own motion . . . may investigate and determine the cost of the production or transportation of natural gas by a natural gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

Since, as we have previously stated, the cost of production and transportation of gas now sold in the intrastate market has a direct effect upon the availability of supply and the cost to the consumer of gas for the interstate market, the provisions of Section 5(b) permitting the investigation of nonregulated activities, when read together with Section 14(a), provide an unassailable legal basis upon which to rest the reporting requirements stated herein. Sections 8, 10, 15, and 16 of the Act supply additional and complementary authority to that set forth previously.

In addition, as noted in the comments filed by Exxon Corporation, similar data to that requested herein was

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[10] 15 U.S.C. § 717m
[11] 15 U.S.C. § 717m
[12] 15 U.S.C. § 717d

required and submitted pursuant to the Notice Expanding Notice of Investigation issued July 17, 1970 in Docket No. R-389A, and on two subsequent occasions.

(B) CLASSIFICATION AND EXEMPTION

The notice of proposed rulemaking issued in this proceeding applied only to companies which are within the jurisdiction of the Commission and which sell more than one Bcf of gas per year. Small producers, those companies which sell less than one Bcf annually, were exempted. Those producers which had an annual sales volume between one and ten Bcf would report quarterly by submitting a verified copy of all nonjurisdictional contracts executed during the applicable period. Those producers, pipeline producing affiliates, and jurisdictional pipelines producing and selling in excess of ten Bcf annually would be required to report monthly on FPC Form No. 45.

The exemption of both small producers subject to Commission jurisdiction, and of all nonjurisdictional producers should not materialy detract from the reliability and accuracy of the data obtained since those producers which are subject to Commission regulation comprise the major domestic natural gas producers. Without conceding that the Natural Gas Act does not vest in this Commission the power to require the information requested herein from nonjurisdictional producers, we do not, at this time, seek to attempt such an action since it would surely result in protracted litigation which would delay the gathering of vital information necessary to our current ratemaking policies.

The reports filed by the jurisdictional and nonexempt companies pursuant to this order will be placed in the public file and open to inspection by the public. Several parties

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that filed comments to our Notice of Proposed Rulemaking herein objected to this policy because the contract information to be submitted is claimed to be confidential.

Arguments similar to these assertions were made to and rejected by this Commission in Opinion Nos. 687 and 687A,[13] which required jurisdictional producers to submit to the Commission certain reserve data which would be placed in the public file. Since the issue presented herein closely resembles that in Opinion Nos. 687 and 687A, we adopt the reasoning stated therein for the purposes of this order. In summary, the extent of the natural gas shortage requires that the information obtained through this investigation of nonjurisdictional sales be available to the public since the Commission's need for the data, as expressed previously, requires public disclosure, and the value to the public of this information far outweighs the claimed pecuniary interest of the producers in confidentiality.[14]

(C) USEFULNESS OF THE DATA

We have already stated that information with regard to nonjurisdictional sales is vital to the effective administration of the Natural Gas Act, especially concerning our ratemaking responsibilities. Specifically, applications submitted pursuant to Order No. 455[15] and the recently reinstated emergency and limited term procedures[16] must be judged, in part, through a comparison of the proposed rate with

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[13] Opinion And Order Requiring Production Of Gas Reserve Data, Opinion No. 687, Docket No. R-405-A, ... F.P.C. ..... (issued February 4, 1974), *as amended*, Opinion And Order Denying Rehearing, Opinion No. 687-A, Docket No. R-405-A, ... F.P.C. ..... (issued April 3, 1974).

[14] F.C.C. v. Schreiber, 381 U.S. 279, 298 (1965).

[15] *Supra*, n.4.

[16] *Supra*, n.8.

the prevailing intrastate prices.[17] The data collected as a result of this investigation will, where relevant, provide a standard against which we can analyze: (1) the accuracy and content of the applicants' assertions as to the price level of the local intrastate market, (2) the effect our pricing policies have on the dedication of new reserves to the interstate market, and (3) the justness and reasonableness of the price proposed in the application.

The establishment of such a standard is only one reason why even a portion of the total data base on non-jurisdictional sales is better than no knowledge at all. However, several respondents to our notice claim that part of the total information is worse than no information at all. The effect of this argument, if carried to its logical conclusion, would be to keep the Commission in the dark as much as possible about all matters relating to the natural gas industry not sponsored by the industry itself. To admit to the efficacy of such an argument would be for this Commission to shirk its regulatory responsibilities as stated in the Natural Gas Act.

Another argument presented in opposition to the investigation was that the information desired was available through the various state regulatory agencies. This Com-

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[17] Opinion And Order Granting Certificates For Pipeline Construction And For Sales Of Natural Gas, Opinion No. 693, Stingray Pipeline Company, *et al.*, Docket Nos. CP73-27, *et al.*, ... F.P.C. ..... (issued May 6, 1974), Opinion And Order Granting In Part Applications For Rehearing, ... F.P.C. ..... (issued June 13, 1974); Opinion And Order Issuing Certificates Of Public Convenience And Necessity And Determining Just And Reasonable Rates, Opinion No. 659, Belco Petroleum Corporation, Agent, *et al.*, Docket Nos. CI73-293, *et al.*, 49 F.P.C. ..... (issued July 20, 1973), ***appeal pending sub nom.***, Consumers Union of United States v. F.P.C., No. 73-192, D.C. Cir., July 20. 1973.

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mission has no authority to compel a state agency to submit its records for inspection by the Federal Power Commission. Therefore, any information that could possibly be obtained from such a state agency would have to be given voluntarily, and which could be withdrawn at any time, or limited in its use. Also, the gas producing states differ widely in the type and manner of regulation. As a result, each state makes its own distinctive requirements for reports and these differences would have to be resolved through considerable effort by our staff before the data could be used in a meaningful way. Also, by going through a state agency rather than dealing directly with jurisdictional companies, the enforcement provisions of the Natural Gas Act would be unavailable to us.

Contrary to the assertions of some respondents, the information requested in this investigation is not available in the form required for our purposes from state administrative agencies whose agreement, if given, to submit the intrastate sales information needed by this Commission could be refused, conditioned, limited, or withdrawn at any time. This is not to say, however, that we may not find it helpful in the future to request that the relevant state agencies submit to this Commission such data as is available to them with regard to intrastate sales of natural gas.

FINDINGS AND CONCLUSIONS

Because of the existing natural gas shortage[18] and the current national energy crisis, it is imperative that the Commission have current information concerning sales of natural gas which are not subject to its ratemaking jurisdiction in order that it may formulate adequate policies

[18] *Supra*, n.5.

concerning sales of natural gas in interstate commerce and for other regulatory purposes. The collection of information concerning intrastate and other nonjurisdictional sales by companies subject to the jurisdiction of the Commission will provide a useful sample of the prices charged for new sales of natural gas which are not within the scope of the Commission's jurisdiction. Since the Commission's immediate concern herein is in obtaining data and information concerning new sales of natural gas, the scope of this rulemaking is being restricted to those sales made pursuant to contracts executed on or after January 1, 1974.[19] This information would be collected through the adoption of the rules and regulations proposed herein.

Information gained in recent area rate proceedings,[20] in many limited term certificate proceedings,[21] and in optional certificate proceedings[22] indicates that rates charged for new sales of natural gas not subject to this Commission's jurisdiction have increased rapidly and significantly in recent years and that these increases make it extremely difficult for interstate pipelines to contract for new supplies of natural gas in onshore areas.[23] This in-

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[19] The Commission may at some future date institute an investigation concerning nonjurisdictional sales made pursuant to contracts executed prior to January 1, 1974.

[20] *See* Area Rate Proceeding (Permian Basin Area), Docket No. AR70-1 (Phase I), Initial Decision Of The Presiding Administrative Law Judge On Permian Basin Area Rates, 50 F.P.C. ..... (issued December 20, 1973), mimeo pp. 8-12, 13-15.

[21] 18 C.F.R. § 2.70; Policy With Respect To Establishment Of Measures To Be Taken For The Protection Of As Reliable And Adequate Service As Present Natural Gas Supplies And Capacities Will Permit, Docket No. R-418. Order No. 431, 45 F.P.C. 570 (1971), *as amended,* Order No. 431-A, 48 F.P.C. 193 (1972).

[22] *Supra,* n.4.

[23] The term "onshore" also refers to areas underlying the seas within the domains of the several states. All natural gas found within the "offshore" federal domain is by location subject to the jurisdiction of the Commission.

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ability to obtain new supplies of gas to replace existing supplies as they are exhausted intensified curtailment of deliveries by various interstate pipelines. It is anticipated that these curtailments will increase in the future.[24]

Current information on sales which are not regulated by this Commission are not reported by any government agency, federal or state, on a comprehensive basis. Furthermore, it is not possible to determine whether prices established by this Commission for sales in interstate commerce are sufficient for interstate pipelines to acquire new gas supplies in competition with purchasers in intrastate markets. The rules and regulations established herein are designed to provide the Commission with a continuing source of information concerning the prices and other conditions attached to sales of natural gas not otherwise subject to the Commission's jurisdiction.

The section of the Commission's Rules promulgated herein applies only to those producers that sell annually in interstate commerce more than one Bcf of gas. Producers which sell less than one Bcf annually, those that qualify for the exemption granted to small producers by Section 154.40[25] of the Commission's Rules and Regulations, are exempt from the provisions set forth herein for the reason that the regulatory burden imposed would exceed the value of the information obtained.[26] Producers that have annual sales between one and ten Bcf will report quarterly on the twentieth day of the month following the end of each calendar quarter by the submission of a verified copy of any applicable contract entered into during the subject time period. Sellers of gas in excess of ten Bcf per year will

[24] Nation-wide Fuel Emergency, Docket No. RM74-8, Order No. 498, 50 F.P.C. ..... (issued December 21, 1973), mimeo p. 1.
[25] 18 C.F.R. § 157.40.
[26] Texaco Inc. v. F.P.C., ... U.S. ..... (June 10, 1974).

report monthly on or before the fifteenth day of the month following the last day of the preceding month for which the report is submitted using the FPC Form No. 45 attached to this order.

FPC Form No. 45 includes the following information:

(1) the producers; (2) the purchaser; (3) the date of the contract; (4) the volume sold during the applicable reporting period (month or quarter); (5) the initial price; (6) contract termination date; (7) the pressure base; (8) periodic escalation provisions; (9) Btu adjustments and the base Btu content for such adjustments; (10) tax reimbursement provisions; (11) other price terms such as so-called "price redetermination clauses"; and (12) the location of the sale by state and county, or parish, or block (for offshore sales within the domains of the several states).

The Commission finds:

(1) The notice and opportunity to participate in this rulemaking are consistent and in accordance with the procedural requirements prescribed by 5 U.S.C. § 553.

(2) Good cause exists that the amendment herein adopted become effective upon issuance of this order.

(3) Adoption of the amendment hereinafter set forth is necessary and appropriate for carrying out the provisions of the Natural Gas Act.

The Commission, acting pursuant to the provisions of the Natural Gas Act, as amended, particularly Sections 5, 8, 10, 14, 15 and 16,[27] *orders:*

(A) Effective upon issuance of this order, Part 260 of Subchapter, Chapter I, Title 18 of the Code of Federal Regulations is amended to add a new Section 260.20 as follows:

[27] 15 U.S.C. §§ 717d, 717g, 717i, 717m, 717n, 717o (1970).

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Section 260.20 Reporting Of New Nonjurisdictional Sales of Natural Gas (Form No. 45)

(a) All independent producers having annual jurisdictional sales in excess of 1.0 Bef (1,000,000 Mcf), pipeline producing affiliates, and pipelines making well-head sales shall verify and report all new sales of natural gas not subject to the rate regulation of the Federal Power Commission made pursuant to contracts executed on or after January 1, 1974.

(b) The sales required to be reported by paragraph (a) are all sales made by the named classes of natural gas companies which are not subject to the ratemaking regulatory authority of the Federal Power Commission pursuant to Sections 4, 5 and 7 of the Natural Gas Act.

(c) The reports required by this section shall be made on FPC Form No. 45 and shall contain the following information with respect to all new non-jurisdictional sales made during the applicable reporting period:

(i) the name of the seller;
(ii) the name of the purchaser;
(iii) the location of the sale by state and county, or parish, or block (for sale made from offshore areas within the domains of the several states);
(iv) the date of the contract;
(v) expiration date of the contract;
(vi) the volume to be sold on an annual basis;
(vii) initial base price;
(viii) tax reimbursement;
(ix) other adjustments to base price;
(x) total price;
(xi) the pressure base (psia);
(xii) escalation provisions;

(d) The applicable reporting period shall be (i) the calendar quarter ending on the last day of the months of March, June, September, and December for all independent producers having annual jurisdictional sales in excess of 1.0 Bcf but less than 10.0 Bcf; or (ii) the calendar month for all other independent producers, all pipeline affiliates, and all pipelines subject to the jurisdiction of the Federal Power Commission.

(e) The reports required by this section shall be completed, verified, and filed as follows:

(i) For all independent producers filing on a quarterly basis, FPC Form No. 45 shall be completed, verified, and filed by the twentieth day of the month following the end of the applicable calendar quarter; or

(ii) For all other natural gas companies required to file FPC Form No. 45, the report for the applicable calendar month shall be completed, verified, and filed by the fifteenth day of the month following the applicable reporting period.

(f) In lieu of filing FPC Form No. 45 all independent producers reporting on a quarterly basis may file verified copies of the contracts for all new nonjurisdictional sales executed during the applicable calendar quarter by the same date prescribed in paragraph (e).

(B) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

(SEAL)

Commissioner Moody, dissenting, joined by Commissioner Brooke, filed a separate statement appended hereto.

Kenneth F. Plumb,
Secretary.

BLEED THROUGH

FPC Form 45
(9-74)

REPORTING OF NEW NONJURISDICTIONAL SALES OF NATURAL GAS BY NATURAL GAS COMPANIES SUBJECT TO THE JURISDICTION OF THE FEDERAL POWER COMMISSION

Approved by GAO
No. B-180228 (R0099)
Expires: 12-31-77

SELLER NAME	FPC USE ONLY SELLER CODE	ADDRESS	PERIOD ENDING

General Instructions:

1. All independent producers having annual jurisdictional sales in excess of 1.0 Bfc (1,000,000 Mcf), pipeline producing affiliates, and pipelines making wellhead and field sales shall verify and report all new sales of natural gas not subject to the rate regulation of the Federal Power Commission made pursuant to contracts executed on or after January 1, 1974, and sales made pursuant to renegotiations or amendments on or after January 1, 1974, to older contracts.

2. The sales required to be reported on this form are all new sales which are not subject to the ratemaking regulatory authority of the Federal Power Commission pursuant to Section 4, 5 and 7 of the Natural Gas Act. All new sales include, among any others, percentage, spot, emergency, non-signatory and short term. Indicate by footnote the type of sale, indicate name of operator.

3. The applicable reporting period shall be (i) the calendar quarter ending on the last day of the months of March, June, September, and December for all independent producers having annual jurisdictional sales in excess of 1.0 Bcf but less than 10.0 Bcf; or (ii) the calendar month for all other independent producers, all pipeline affiliates, and all pipelines subject to the jurisdiction of the Federal Power Commission. The reports required shall be completed, verified, and filed as follows: (i) For all independent producers filing on a quarterly basis, FPC Form 45 shall be completed, verified, and filed by the twentieth day of the month following the end of the applicable calendar quarter; or (ii) For all other natural gas companies required to file FPC Form 45, the report for the applicable calendar month shall be completed, verified, and filed by the fifteenth day of the month following the applicable reporting period. In lieu of filing FPC Form 45 all independent producers reporting on a quarterly basis may file verified copies of the contracts for all new nonjurisdictional sales executed during the applicable calendar quarter by the same date prescribed above. The first report shall be due 45 days from the date of issuance of this order covering the new sales made between January 1, 1974 and the date of issuance of the order. The next report shall be due on the dates as specified herein with no gap in the data required to be reported.

4. An original and four copies of each report shall be filed with the Federal Power Commission, 825 North Capitol Street N.E., Washington, D.C. 20426.

	FPC USE ONLY PURCHASER CODE	PURCHASER (a)	LOCATION OF SALE (State and county, or parish or block, and field or plant or other location) (b)	FPC USE ONLY FIELD OR PLANT, STATE AND COUNTY CODES Fld/Plt	St	Cty	CONTRACT DATE 1/ (c)	CONTRACT EXPIRATION DATE (d)	INITIAL DELIVERY DATE (e)
1									
2									
3									
4									
5									
6									

C-15

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FPC Form 65 Cont'd
(9-74)

REPORTING OF NEW NONJURISDICTIONAL SALES OF NATURAL GAS
BY NATURAL GAS COMPANIES SUBJECT TO THE
JURISDICTION OF THE FEDERAL POWER COMMISSION-CONTINUED

Approved by GAO
No. B-180228 (R0099)
Expires: 12-31-77

	VOLUME TO BE SOLD ON ANNUAL BASIS (Mcf at 14.73 psia) (f)	INITIAL BASE PRICE (¢/Mcf at 14.73 psia) (g)	TAX REIMBURSEMENT (¢/Mcf at 14.73 psia) (h)	OTHER ADJUSTMENTS TO BASE PRICE (Explain by Footnote) (¢/Mcf at 14.73 psia) (i)	TOTAL PRICE (¢/Mcf at 14.73 psia) (j)	ESCALATION PROVISIONS AND EFFECTIVE DATES 2/ (k)
1						
2						
3						
4						
5						
6						
7						

1/ Indicate by footnote dates of renegotiations or amendments on or after January 1, 1974, to older contracts.

2/ Spiral, favored nation (2 or 3 party), redetermination, renegotiation, periodic, etc. Include contingent adjustments, e.g., any price adjustment which would cause the intrastate price to meet or exceed any price ceiling set by the Federal Power Commission after the date of the intrastate contract.

ATTESTATION AND PERSON TO BE CONTACTED REGARDING DATA ENTERED ON THIS FORM			
The information in this report is as accurate and complete as can be supplied from the records and data available to the respondent.			
SIGNATURE OF ATTESTOR	DATE SIGNED	DATE REPORT PREPARED	TELEPHONE NUMBER: Area Code ( )
NAME AND TITLE (Typewritten or Printed)			

C-16

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BLEED THROUGH

Investigation of Rates Charged For Nonjurisdictional Sales Of Natural Gas By Natural Gas Companies Subject To The Jurisdiction Of The Federal Power Commission	Docket No. RM74-12

(Issued January 9, 1975)

MOODY, Commissioner, *dissenting*, joined by Brooke, Commissioner:

I direct this dissent to an order requiring persons subject to our jurisdiction to report periodically on nonjurisdictional activities. The majority order is without legal authority or regulatory purpose.

I.

To articulate the reasons why the majority order is illegal, it is necessary to state basic facts. First, a producer of natural gas may sell his gas in interstate commerce, for resale, and thereby subject that sale to the rate and certificate jurisdiction of this Commission. Or he may choose, as many do, to sell his gas in intrastate commerce, or to make a direct sale to a natural gas user, within or without the state where the gas is produced; in either of these events, the sale is not subject to the jurisdiction of the Commission. The producer may, and usually does, engage also in the sale of oil and liquid hydrocarbons extracted from the natural gas stream, and these sales — whether in intrastate or interstate commerce — are outside the ambit of Commission jurisdiction. Any one producer (and therefore all producers) may reasonably be expected to engage in jurisdictional gas sales and nonjurisdictional gas sales, and nonjurisdictional oil and liquids sales simultaneously. No producer is required to confine his business activities to oil and gas exploration and production, and consequently the producer who is making jurisdictional natural gas sales may also be reasonably expected to be engaging in other,

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nonjurisdictional activities at the same time he is making jurisdictional gas sales.

A transporter of natural gas in interstate commerce is subject to the rate and certificate jurisdiction of the Commission with respect to the facilities and service involved in the interstate movement of natural gas; sales for resale by the transporter are subject to Commission jurisdiction, but the rates for direct sales by the transporter to consumers are nonjurisdictional. Thus a transporter usually engages in simultaneous jurisdictional and nonjurisdictional natural gas transactions. At the same time, the interstate transporter may be engaged in nonjurisdictional activities, such as the manufacture of synthetic gas, or the mining and gasification of coal; and some transporters, by reason of diversification, may also be engaged in activities wholly unrelated to the energy business.

The heterogeneous nature of the activities of natural gas producers and transporters is a fact of life, now as it was at the time of passage of the Natural Gas Act. Congress did not choose to draw all activities of all gas producers and gas transporters within the ambit of Commission jurisdiction. As noted in *F.P.C.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 493 (1949):

> "Without entering upon another review of legislative history, suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution."

With today's order, the Commission, for the second time in recent months,[1] crosses into the forbidden zone where

[1] See Opinions No. 687 and 687-A, issued February 4, 1974, and April 4, 1974, in Docket No. R-405-A, and particularly the dissents thereto.

BLEED THROUGH

jurisdiction does not exist. The majority order is labeled as an order dealing with ". . . Rates Charged for Non-jurisdictional Sales of Natural Gas . . .". This is a fair and concise admission of what is here intended and here accomplished; the majority is requiring periodic reports concerning a specific area of nonjurisdictional activities — producer sales in intrastate commerce. Mandatory public disclosure of the details of a line of economic activity, on a regular, recurring basis, which disclosure is instituted on a permanent basis, is regulation of that line of economic activity.[2]

II.

I do not quarrel with the abstract proposition that current information on sales of natural gas in intrastate commerce is desirable. An agency of limited jurisdiction, such as ours, may see many things which are desirable, but if we exceed our jurisdiction in attempting to effectuate our desires, we act unlawfully. Thus, even though the Commission felt it desirable that royalty owners be regulated as natural gas producers, an attempt to expand the meaning of Section 1(b) of the Natural Gas Act to cover royalty owners was reversed as unlawful. *Mobil Oil Corp.* v. *F.P.C.*, 463 F.2d 256 (CADC, 1971), cert. denied 406 U.S. 976 (1972). The court there said:

> ". . . the purpose of the Act is to protect the ultimate beneficiaries against exploitation by natural gas companies. That was indeed the objective of Congress, see *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). The FPC is to be commended for attempting to further that objective, but it is not sufficient justification upon which to base an expansion of the Act

[2] *Cf,* The Securities Act of 1933, 15 U.S.C. 77a *et seq.*, which regulates the offering and sale of securities through filing and disclosure requirements.

> to activities clearly not within its terms. Congress did not give the FPC carte blanche to take whatever action it might consider appropriate in furtherance of this purpose. The FPC is limited by the provision establishing its jurisdiction, . . . ".

So also, even though the Commission found it desirable to set rates for pipeline transport of liquid hydrocarbons, an attempt to expand Sections 1(b), 4, and 5 of the Act was struck down. *Mobil Oil Corp.* v. *F.P.C.*, ... F.2d ..... (CADC, 1973). The court there noted:

> "The Commission essentially argues that it has jurisdiction here because the transportation of liquids is part of a total transaction that includes the transportation of natural gas. As this court has noted, however, 'Congress did not give the FPC *carte blanche* to take whatever action it might consider appropriate in furtherance of' the objectives of the Act. The Commission cannot gain jurisdiction over an activity simply by characterizing it as part of a 'total transaction' of which another part happens to be subject to the FPC's control . . . ." (Footnote omitted.)

These cases are but the most recent of an unbroken line of authority emphatically telling us that ours is no[t] an agency of unlimited power. Three things, and three things only, have been committed to our jurisdiction: Transportation of natural gas for resale in interstate commerce, sale of natural gas for resale in interstate commerce, and natural gas companies engaging in such transportation or sale.[3] Jurisdiction over natural gas companies does not confer jurisdiction over their affairs other than jurisdictional sales or transportation, for not only is our statute cast in terms of "in interstate commerce" rather

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[3] *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947).

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than "affecting interstate commerce", but also because Section 1(b) of the Act expressly states:

> "(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce . . . [and] . . . sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Thus the statute does not authorize the Commission to exercise jurisdiction over natural gas company transactions in leaseholds,[4] or over any sales other than sales for resale in interstate commerce.[5]

My conviction that the majority surpasses jurisdictional bounds is eloquently supported by the National Association of Regulatory Utility Commissioners (NARUC) in their submittal in this docket. NARUC, a quasi-governmental nonprofit organization, was founded in 1889. Within its membership are the governmental bodies of the fifty States and the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. More specifically, NARUC contains the state officials charged with the duty of regulating the gas utilities within their respective states and, as such, they have the obligation to assure the establishment and maintenance of such gas service and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates that are just and reasonable.

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[4] *F.P.C.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949).
[5] *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635 (1945).

In its filing, NARUC states:

"The Executive Committee of the NARUC, by motion adopted on February 28, 1974, agreed that comments should be filed with the FPC in this proceeding for the purpose of informing the Commission that, in its view, the Congress has not granted the Commission authority to require reports from gas companies concerning their nonjurisdictional sales . . . .

The decision by the Commission of the issues in this proceeding is of paramount regulatory importance and one which may have a substantial impact on the Congressionally-prescribed division of regulatory responsibilities between Federal and State authorities over the activities of gas companies. The members of the NARUC are vitally concerned with these issues and the precedents which will be established by their resolution . . . ."

NARUC thereafter states:

"The jurisdiction and power of the Federal Power Commission can be no greater than that which Congress has conferred upon it. The Commission, if it orders into effect the regulation proposed in its Notice and briefly described above, will clearly be exceeding the limits placed on its authority by Congress when it enacted into law the Natural Gas Act of 1938 (15 U.S.C., Sec. 717 *et seq.*), and when it further amended such Act in 1954 by adding Subsection c to Secton 1 [15 U.S.C., Sec. 717(c)], known as the Hinshaw Amendment.

As the supreme Court noted in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-3, 93 L. Ed. 1499, 1503-4, 69 S. CT. 1251 (1949):

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> [S]uffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power.
>
> • • • • • •

In this proceeding, the Commission is attempting to require gas companies to submit regular reports to the Commission on what are, admittedly, intrastate and other nonjurisdictional sales made by those companies. The Commission alleges that such reports are necessary in furtherance of the statutory responsibilities it does have. The question is, though, whether the promulgation of such a reporting requirement is authorized by the Act, for necessity is not the equivalent of authority. As the Supreme Court stated in *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 635-6, 32 L. Ed. 2d 369, 382, 92 S. CT. 1827 (1972):

> [A] *need* for federal regulation does not establish FPC jurisdiction that Congress has not yet granted."

The majority's unwarranted extension of the Commission's jurisdictional reach to require public disclosure of nonjurisdictional activities should be gauged not only in terms of the particular form of regulation imposed on a particular category of nonjurisdictional activity, but also in terms of what lies next down the path.

Put most starkly, if the FPC has the power to compel reporting of nonjurisdictional gas sales, transactions which are *not* in interstate commerce, it must follow that the Commission has the power to compel "natural gas companies" to report on transactions in oil, domestic and foreign, coal, gasoline, and any other fuel.

One need but glance at the list of companies which are "natural gas companies" within the definition of the Natural Gas Act to appreciate the significance of the majority's position that our power to require reports is unbounded

by limitations on our substantive jurisdiction. When we recall that the subject matter of the reporting required by the majority order concerns sales of natural gas which has *not* been dedicated to interstate commerce, which is *not* being sold or transported in interstate commerce, and which is *not* otherwise subject to the jurisdiction of this Commission, it must surely be obvious that the majority is claiming a statutory power of sufficient breadth to cover required reporting by all natural gas companies of other nonjurisdictional transactions.

It is peculiarly within the province of Congress to decide what reporting is necessary, by whom it is to be conducted, and what, if any, safeguards should be created.[6] Congress is now in the process of resolving these problems.[7] In only one[8] of the pending proposals before Congress is it suggested that the Federal Power Commission become the energy information-gatherer for government.

I do not believe that Congress has already extended our regulatory reporting reach beyond the jurisdictional grant of Section 1(b) of the Act. I believe that our powers to regulate (which includes the power to require compulsory reports) must be founded in either transportation or sales for resale in interstate commerce. Such intrastate gas sales are *not* in interstate commerce, they are as far removed from our jurisdiction as the leases which contain those

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[6] See *Energy Information Needs — Study by the General Accounting Office,* Serial No. 93-33 (92-68), prepared for Committee on Interior and Insular Affairs, United States Senate, pursuant to S. Res. 45, a National Fuels and Energy Policy Study.

[7] S. 2506, S. 2782, S. 2861, S. 3151, H.R. 11903, H.R. 12176, H.R. 12245, and H.R. 12534 all deal expressly with the very type of reporting which today the majority says it is empowered to compel.

[8] S. 2506.

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reserves.[9] Clearly the existence of, and the magnitude of, intrastate sales of natural gas may *affect* interstate commerce. But the difference between gas transactions "in" interstate commerce, and gas transactions "affecting" interstate commerce, is precisely the difference between what Congress entrusted to us, and what Congress withheld from us.

The notion that our basic jurisdictional grant must be read into every section of the Natural Gas Act is not original. Recently, we have been reminded that the Act contains certain "core" sections[10] which define our substantive regulatory functions, and certain "necessary and appropriate" sections[11] which outline permissible procedures for use in performing the substantive regulatory functions. We have been told unequivocally that the "necessary and appropriate" sections are not independent grants of power, and cannot be used to enlarge the "core" section regulatory functions. *Mobil Oil Corporation* v. *F.P.C.*, ... F.2d ..... (CADC, No. 72-1471, slip opinion issued July 11, 1973). The court there held — and we did not seek Supreme Court review — that:

> ". . . Section 16, which uses a broad generality of 'necessary and appropriate' that is not rooted in a (substantive regulatory) function, cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined." (Slip opinion at pp. 36-37; parenthesis added.)

This view is in accord with *F.P.C.* v. *Panhandle Eastern Pipe Line Co., supra,* at pp. 505-506; *New England Power Company* v. *F.P.C.*, ... F.2d ..... (CADC, No. 71-1539, slip

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[9] *F.P.C.* v. *Panhandle Eastern Pipe Line Co., supra.*
[10] Such sections as Sections 4, 5, and 7.
[11] Such sections as Sections 8, 9, 10, 14 and 16.

opinion issued August 15, 1972, cert. granted 41 U.S.L.W. 3608); and *Niagara Mohawk Power Company* v. *F.P.C.*, 329 F.2d 153 (CADC, 1967). This same reading of the Act was reiterated in *American Smelting & Refining Company, et al.* v. *F.P.C.*, ... F.2d ..... (CADC, No. 72-2204, slip opinion issued January 21, 1974) at pp. 16-17.

III.

The majority claims, as a legal foundation for its regulation of intrastate sales, the applicability of Sections 5, 8, 10, 14, 15 and 16 of the Natural Gas Act. As already noted, Sections 8, 10, 14, 15 and 16 contain no independent grant of authority, but may be invoked only in aid of Sections 3, 4, 5, or 7, the so-called "core sections" of the Act. Let us see, therefore, if recourse to Section 5 supports what the majority here attempts.

Section 5(a) specifies ratemaking powers, but this subsection provides the FPC with authority to prescribe rates only with respect to sales or transportation in interstate commerce. Section 5(b) [15 U.S.C., Sec. 717d(b)] authorizes the Commission to investigate the *cost* of production or transportation of natural gas not otherwise subject to the ratemaking authority of the Commission. Section 5(b) reads:

> "The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, *may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or* sale of such natural gas." (Emphasis supplied.)

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Since Section 5(b) refers specifically and deliberately to costs, not sales, of certain nonjurisdictional activities of gas companies, the Commission is prevented from investigating such sales by application of the well-established principle of statutory construction, *expressio unius est exclusio alterius.*

As recently as January 9, 1974, the Supreme Court applied that principle to a provision of the Amtrak Act, describing it as follows:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode. Botany Mills v United States, 278 US 282, 289, 73 L Ed 379, 49 S Ct 129 (1929). This principle of statutory construction reflects an ancient maxim — expressio unius est exclusio alterius."
>
> *National Railroad Passenger Corporation* v. *National Association of Railroad Passengers,* ..... U.S. ..... 38 L. Ed 2d 646, 652, 94 S. Ct. .....

The procedural sections of the Act cited by the majority (Sections 8, 10, 14, 15 and 16) as authority for promulgating the regulation imposed in this proceeding, provide no sustenance for the majority. In none of these provisions did Congress specifically provide the Commission with authority to require reports on nonjurisdictional sales of gas companies. For example, in Section 10 dealing directly with the FPC's authority to require reports, there is no reference at all to reports on nonjurisdictional activities of gas companies. The exclusion of such a reference is significant since, as noted above, Congress *did* provide the Commission, in no uncertain terms, with authority to investigate and determine the *cost* of certain nonjurisdictional activities of gas companies in Section 5(b). If Congress had intended to allow the Commission to require re-

ports on nonjurisdictional sales of those same companies, it most certainly would have made its intention clear as it did in regard to the investigation of certain nonjurisdictional costs.

If Congress had intended this Commission to exercise the regulatory power of required reporting over nonjurisdictional activities, Congress surely would have worded Section 14 of the Natural Gas Act in the same fashion as Congress worded Section 311 of the Federal Power Act. Section 311, otherwise substantially the same as Section 14(b) of the Natural Gas Act, contains an express authorization for the Commission to investigate and secure information with respect to matters *"whether or not otherwise subject to the jurisdiction of the Commission.*

It is significant that this Commission has historically recognized the fundamental difference between our investigatory powers under the Natural Gas Act and Section 311 of the Federal Power Act, and has, for years, sought legislative change to grant broadened authority in the natural gas field. For example, in the Commission's 1959 Report to Congress, the Commission, then under the chairmanship of the Honorable Jerome Kuykendall, recommended:

> *"Natural Gas Act — comprehensive investigatory authority.* — That section 14(a) of the Natural Gas Act be amended so as to give to the Commission broad investigatory powers with respect to the gas industry similar to those now conferred on it with respect to the electric industry by section 311 of the Federal Power Act." (P. 21; footnote omitted.)

Similarly, in the Commission's 1962 Report to Congress, the Commission, then under the chairmanship of the Honorable Joseph C. Swidler, recommended:

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"*Broadened informational authority.* — Amend Section 14(a) so as to give the Commission broad powers to conduct investigations and collect information with respect to the natural gas industry similar to those now conferred on it with respect to the electric industry by section 311 of the Federal Power Act.

This would fill a serious void in the Commission's effectiveness for, in the absence of authority such as is presently provided for the electric power industry by the provisions of section 311 of the Federal Power Act, the existing statistical information on the industry as a whole is inadequate to meet the needs for detailed industry information of value to the Commission, Congress, other Government agencies, and the general public. As in the case of the analogous section of the Federal Power Act, the proposal makes clear that the new informational activities would not subject to the Commission's jurisdiction any persons not already subject thereto . . ." (P. 13.)

So also, in the Commission's 1966 Annual Report to Congress, the Commission, then under the Chairmanship of the Honorable Lee C. White, recommended:

"*Broadened Informational Responsibility Under the Natural Gas Act.*

The Commission recommends the amendment of the Natural Gas Act to enable the Commission to gather, publish and disseminate appropriate information about the entire natural gas industry for the benefit of consumers, interested State and Federal agencies and the industry itself. The natural gas industry has grown into one of the major industries of the Nation, supplying one-third of our national energy requirements. Consequently the need for detailed and continuing information concerning this basic resource has become equally compelling with the need for electric energy information, . . . which the Commission now supplies under the authority of Section 311 of the Federal Power Act. . . ." (P. 9.)

Finally, in its 1972 Report to Congress, the Commission, under the chairmanship of the Honorable John N. Nassikas, proposed:

> ". . ., the Commission has in prior sessions of Congress proposed the adoption of a bill . . . which would enlarge the Commission's authority under the Natural Gas Act to collect, publish and disseminate information with respect to the natural gas industry comparable to that which it already possesses regarding the electric utility industry under the Federal Power Act. The Commission considers that such added authority would enable it to act more effectively on the basis of more complete information with a view to meeting the serious gas supply problems with which the United States is now confronted and which will exist for an indefinite period in the future." (P. 8.)

I choose the foregoing as illustrative, since it appears that the Commission has made the same legislative recommendation in every annual report to Congress for at least the past 20 years.

For the Commission now to interpret the Natural Gas Act in a manner contrary to a 20-year pattern of interpretation is indefensible; particularly so when the new interpretation would reach a result totally inconsistent with the substantive limitations placed on the Commission's scope of authority in Sections 1(b) and 1(c) of the Act and the narrow exemption to such limitation provided in Section 5(b) concerning costs of nonjurisdictional activities. Irrespective of the "necessary or appropriate" phrase in Section 10 and in other subsidiary sections of the Act, this phrase cannot logically be employed in a manner which would undermine the overall design Congress had in mind when enacting the Natural Gas Act of 1938.

As Sections 1(b) and 1(c) of the Act clearly demonstrate, the basic design of the Act is one of dual state and

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federal authority, with a clear delineation of the limits of the FPC's authority. As the U.S. Court of Appeals for the District of Columbia remarked on the scope of authority provided the Commission by Section 16 of the Act, which authorizes the Commission to issue rules and regulations "as it may find necessary or appropriate to carry out the provisions of this chapter":

> "Both sections [Section 16 of the Natural Gas Act and Section 309 of the Federal Power Act] are of an implementary rather than substantive character. The cases have made abundantly clear that while these provisions must be read in a broad expansive manner, they can only be implemented 'consistently with the provisions and purposes of the legislation,' and 'that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." These sections merely augment existing powers conferred upon the agency by Congress, they do not confer independent authority to act." *New England Power Co.* v. *F.P.C.*, 467 F.2d 425, 430-1 (CADC, 1972).

Since Congress left the regulation of intrastate gas sales to the jurisdiction of state authorities, a Commission order that requires the systematic reporting of such non-jurisdictional sales is clearly contrary to the Congressional regulatory design implanted in the Natural Gas Act.

IV.

One final area of comment remains. I dissent to the majority's regulation of intrastate sales because I see no rational explanation of *why* the required data is sought, and *how* it will be used. If jurisdiction existed to require the reporting here sought, it would still be necessary for

the Commission to articulate the regulatory purpose and need for, and use of, the required data. See *F.C.C.* v. *Schreiber*, 338 U.S. 279 (1965).

The majority says (p. 2) that "The development which has made this investigation necessary at this time is the natural gas shortage, with its concomitant rise in demand, thereby fueling the growth of an ever-expanding intrastate market in the producing states."

I invite critical analysis of this assertion. Leaving aside the absurdity of claiming that a shortage gives rise to a "concomitant rise in demand", and that either the shortage, or the increased demand, is "fueling the growth of an ever-expanding market in the producing states", it is obvious that the majority has provided no substantive statement of why this regulation is promulgated.

Next, the majority says (p. 3) that in setting rates for interstate sales the Commission "must look beyond the costs involved to also consider various non-cost factors, such as supply considerations and intrastate rates". For this assertion, the majority could well quote Commissioner Moody, for surely this is my view of the law; however, I must respectfully point out that my views in this respect do not prevail, and have not prevailed, with my colleagues for many months now. Whether we have been setting rates for short-term sales,[12] or for long-term sales,[13] a majority

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[12] See: Orders issued May 24, 1974 in *Apexco, Inc., et al.* (Docket Nos. CI73-804, *et al.*), *C & K Petroleum, Inc.* (Docket No. CI73-697), *Gulf Oil Corporation* (Docket No. CI73-716), *Apexco, Inc.* (Docket No. CI73-699), *Okmar Oil Company* (Docket No. CI73-707), *Southwest Gas Producing Company, Inc.* (Docket No. CI73-644), *Apexco, Inc.* (Docket No. CI73-677), *Cities Service Oil Company* (Docket No. CI74-49), *Brunson & McKnight, Inc. (Operator), et al.* (Docket No. CI73-920), and *Kirby Petroleum Co.* (Docket No. CI74-292); Order issued June 5, 1974, *Exxon Corporation*, Docket No. CI74-102; Order

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of this Commission —— despite my protestations to the contrary — has not utilized intrastate sales rate data in its rate determinations. More than a little hypocrisy is evident in the majority order.

Next, the majority says (p. 4), that the regulation here promulgated will be "vital" in reviewing rates for emergency or limited term sales. If this is true, why did the Commission, in reinstituting short-term sales procedures in Opinion No. 699-B,[14] require that *each* applicant carry its own individual burden of proof to show that the proposed rate serves the public convenience and necessity? As these short-term cases are processed under Opinion No. 699-B, it will *not* be to the collected data called for in *this* rulemaking that the Commission looks, but rather it will be to the individual record made in each proceeding. I think it grossly misleading, to litigants and to a reviewing court, to assert that the nonjurisdictional sales data here demanded is "vital", when, in fact, we have already clearly stated that we will not use it.

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issued June 25, 1974, *Cities Service Oil Company*, Docket No. CI74-163; and Order issued June 28, 1974, *Aubrey C. Black, et al.*, Docket No. CI74-12.

[13] See: Opinion No. 668-A issued December 7, 1973, *Northern Michigan Exploration Company, et al.*, Docket Nos. CI72-301, *et al.*; Opinion No. 693 issued May 6, 1974, *Stingray Pipeline Co., et al.*, Docket Nos. CP73-27, *et al.*; Order issued May 31, 1974, *Pennzoil Company, et al.*, Docket Nos. CI74-264, *et al.*; Opinion No. 693-A issued June 13, 1974, *Stingray Pipeline Co., et al.*, Docket Nos. CP73-27, *et al.*; Order issued June 17, 1974, *Pennzoil Company*, Docket No. CI74-253; Opinion No. 699 issued June 25, 1974, *Diamond Shamrock Corporation*, Docket Nos. CI74-137, *et al.*; and Order issued July 3, 1974, *Texaco Inc., et al.*, Docket Nos. CI74-82, *et al.*

[14] Issued September 9, 1974, in Docket No. R-389-B, ... F.P.C. .....

Next, the majority says (p. 5) that they proceed on a sound legal basis in furtherance of the Commission's responsibilities because "the cost of production and transportation of gas now sold in the intrastate market has a direct effect upon the availability of supply and the cost to the consumer of gas for the interstate market." Again, I invite analysis. If the majority's statement is true, it might support a proceeding under Section 5(b) to determine "the cost of production and transportation"; but the regulation today is not such a proceeding. The data collected will tell us nothing about the *cost* of production or the *cost* of transportation. We here deal with the rate at which intrastate sales are being made; no cost data at all is reportable.

The majority's final assertions concerning the regulatory purpose of this mandatory reporting are set forth at pp. 6-7, where again it is claimed that the reported data is useful in assessing individual producer rate cases, and p. 9 where it is claimed that, absent the reporting required here, it is "not possible to determine whether prices established by this Commission for [interstate] sales are sufficient for interstate pipelines to acquire new gas supplies in competition with purchasers in intrastate markets."

Neither assertion is truthful. First, as already noted, we have announced our intention to place the burden of proof on individual applicants to establish the propriety of the rate applied for.[15] The majority today expresses no willingness to use *and follow* the collected data on intrastate sales; absent that commitment, the data collection becomes a matter of curiosity, not a matter of ratemaking. As to

[15] See Opinion No. 699-B, *supra*, as to short-term sales; as to sales under Order No. 455, see Order issued October 3, 1974, in Docket No. CI75-119, *William A. Jenkins (Operator), et al.*, where the applicant was told specifically not to proffer evidence relating to general market conditions in the intrastate market.

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the second assertion, I invite comparison with Commission orders in Docket No. RM74-3, wherein, in Orders 491, 491-A and 491-B we made it abundently clear that it was not only "possible" to assess the efficacy of our rates in pipeline gas procurement efforts, but indeed that such an assessment had been made by the Commission. We already receive a plenitude of informational reporting on the pipelines' ability to attract new gas supplies, and we issue quarterly reports to the public concerning these efforts.[16]

I submit that the majority makes no case at all for *why* regulation of the intrastate market is necessary, or *how* the information obtained will be used. Absent this analysis, on a meaningful basis, a reviewing court will never reach the test of *F.C.C.* v. *Schrieber, supra.* In my judgment, even were the jurisdictional hurdles overcome, the majority's order would not be lawful unless and until it articulates why the information sought is necessary to fulfillment of the Commission's responsibilities, and how the information sought will be used in the exercise of a specific statutory duty. Since neither showing is made here, the order cannot stand.

V.

The burden of implementing the majority's regulation of intrastate sales is the subject of numerous comments in the record before us. I am particularly concerned with the burden imposed on small producers,[17] who, as a result of today's order, are given a heavier reporting load on

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[16] See "Gas Supply Indicators", published quarterly and particularly Charts IA, IB, VIII, IX and XI.

[17] Those producers selling 10,000,000 Mcf or less annually in interstate commerce for resale are classified as small producers under our Regulations.

non-jurisdictional sales than they carry as to jurisdictional sales.[18] Such an anomaly cannot be defended.

There are two current and continuing shortages that this Commission can fully comprehend — the shortage of natural gas, and the shortage of paper. We bear grave responsibilities for both, having been the major cause of the former through our wellhead price regulation, and a major contributor to the latter through our increasing requirements for more and more forms to be filled out and reports to be filed.

We are inundated in a flood of paper. We require more information now than we can assimilate, and we compel filings that we never use. This is nonproductive regulation. It is imposed at the expense of the consuming public, which must pay the costs of regulation through regulated rates which reimburse the regulated company for regulatory expenses.

At a time when public demand is mounting for an end to regulatory practices and procedures which increase costs, my colleagues embark upon a new mandatory reporting system that is without legal foundation and which will gather information that will not be used. I have supported legitimate reporting requirements in the past, and I will continue to do so in the future. I cannot support the reporting required in this proceeding.

s/ Rush Moody, Jr.
Rush Moody Jr., Commissioner

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[18] Under § 157.104 of our Regulations, a small producer has an annual reporting requirement on jurisdictional sales of natural gas, but this annual report (compared to quarterly reports required on nonjurisdictional sales) does not require the detail required by the majority here.

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FPC Form 65 Cont'd
(9-74)

REPORTING OF NEW NONJURISDICTIONAL SALES OF NATURAL GAS BY NATURAL GAS COMPANIES SUBJECT TO THE JURISDICTION OF THE FEDERAL POWER COMMISSION-CONTINUED

Approved by GAO
No. B-180228 (R0099)
Expires: 12-31-77

	VOLUME TO BE SOLD ON ANNUAL BASIS (Mcf at 14.73 psia) (f)	INITIAL BASE PRICE (¢/Mcf at 14.73 psia) (g)	TAX REIMBURSEMENT (¢/Mcf at 14.73 psia) (h)	OTHER ADJUSTMENTS TO BASE PRICE (Explain by Footnote) (¢/Mcf at 14.73 psia) (i)	TOTAL PRICE (¢/Mcf at 14.73 psia) (j)	ESCALATION PROVISIONS AND EFFECTIVE DATES 2/ (k)
1						
2						
3						
4						
5						
6						
7						

1/ Indicate by footnote dates of renegotiations or amendments on or after January 1, 1974, to older contracts.

2/ Spiral, favored nation (2 or 3 party), redetermination, renegotiation, periodic, etc. Include contingent adjustments, e.g., any price adjustment which would cause the intrastate price to meet or exceed any price ceiling set by the Federal Power Commission after the date of the intrastate contract.

ATTESTATION AND PERSON TO BE CONTACTED REGARDING DATA ENTERED ON THIS FORM

The information in this report is as accurate and complete as can be supplied from the records and data available to the respondent.

SIGNATURE OF ATTESTOR	DATE SIGNED	DATE REPORT PREPARED	TELEPHONE NUMBER: Area Code ( )
NAME AND TITLE (Typewritten or Printed)			

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FPC Form 45
(9-74)

REPORTING OF NEW NONJURISDICTIONAL SALES OF NATURAL GAS BY NATURAL GAS COMPANIES SUBJECT TO THE JURISDICTION OF THE FEDERAL POWER COMMISSION

Approved by GAO
No. B-130228 (R0099)
Expires: 12-31-77

SELLER NAME	FPC USE ONLY SELLER CODE	ADDRESS	PERIOD ENDING

General Instructions:

1. All independent producers having annual jurisdictional sales in excess of 1.0 Bfc (1,000,000 Mcf), pipeline producing affiliates, and pipelines making wellhead and field sales shall verify, and report all new sales of natural gas not subject to the rate regulation of the Federal Power Commission made pursuant to contracts executed on or after January 1, 1974, and sales made pursuant to renegotiations or amendments on or after January 1, 1974, to older contracts.

2. The sales required to be reported on this form are all new sales which are not subject to the ratemaking regulatory authority of the Federal Power Commission pursuant to Section 4, 5 and 7 of the Natural Gas Act. All new sales include, among any others, percentage, spot, emergency, nonsignatory and short term. Indicate by footnote the type of sale, indicate name of operator.

3. The applicable reporting period shall be (i) the calendar quarter ending on the last day of the months of March, June, September, and December for all independent producers having annual jurisdictional sales in excess of 1.0 Bcf but less than 10.0 Bcf; or (ii) the calendar month for all other independent producers, all pipeline affiliates, and all pipelines subject to the jurisdiction of the Federal Power Commission. The reports required shall be completed, verified, and filed as follows: (i) For all independent producers filing on a quarterly basis, FPC Form 45 shall be completed, verified, and filed by the twentieth day of the month following the end of the applicable calendar quarter; or (ii) For all other natural gas companies required to file FPC Form 45, the report for the applicable calendar month shall be completed, verified, and filed by the fifteenth day of the month following the applicable reporting period. In lieu of filing FPC Form 45 all independent producers reporting on a quarterly basis may file verified copies of the contracts for all new nonjurisdictional sales executed during the applicable calendar quarter by the same date prescribed above. The first report shall be due 45 days from the date of issuance of this order covering the new sales made between January 1, 1974 and the date of issuance of the order. The next report shall be due on the dates as specified herein with no gap in the data required to be reported.

4. An original and four copies of each report shall be filed with the Federal Power Commission, 825 North Capitol Street N.E., Washington, D.C. 20426.

FPC USE ONLY PURCHASER CODE	PURCHASER (a)	LOCATION OF SALE (State and county, or parish or block, and field or plant or other location) (b)	FPC USE ONLY FIELD OR PLANT, STATE AND COUNTY CODES Fld/Plt	St	Cty	CONTRACT DATE 1/ (c)	CONTRACT EXPIRATION DATE (d)	INITIAL DELIVERY DATE (e)
1								
2								
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SEE REVERSE FOR CONTINUATION OF FORM

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APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Rush Moody, Jr., William L. Springer, and Don S. Smith.

Investigation Of Rates Charged For Nonjurisdictional Sales Of Natural Gas By Natural Gas Companies Subject To The Jurisdiction Of The Federal Power Commission	Docket No. RM74-12

ORDER NO. 521-A

ORDER DENYING STAY AND MAINTAINING NON PUBLIC STATUS OF DATA PENDING REHEARING

(Issued February 19, 1975)

On January 9, 1975, we issued Order No. 521, which promulgated a reporting system whereby jurisdictional companies would submit to the Commission information concerning their intrastate sales during a set period of time. On February 10, 1975, we granted rehearing for purposes of further consideration based on the petitions filed by Atlantic Richfield Company, Texaco Inc., and Union Oil Company of California.

Several of the parties that petitioned for rehearing[1] also requested a stay[2] of the effectiveness of Order No.

[1]In addition to the parties mentioned in the February 10, 1975 order, petitions for rehearing have been filed by Mitchell Energy Corporaiton, Continental Oil Company, Mapco, Inc., Cities Service Oil Company, The California Company, a Division of Chevron Oil Company, Mobil Oil Corporation, Exxon Corporation, Superior Oil Company, Tenneco Oil Company, TransOcean Oil, Inc., National Association of Regulatory Utility Commis-

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521, either until the Commission issues its final order on rehearing or through any period necessary for judicial review. The effect of a stay would be that the information sought by the Commission in Order No. 521 would not be forthcoming. This result is inconsistent with our urgent need for the data, as expressed in Order No. 521, and is, therefore, denied.

Mobil Oil Corporation (Mobil) has requested that we stay the effect of Order No. 521 until ten days after the issuance of any final order on rehearing and Union Oil Company of California has requested that the data filed pursuant to Order No. 521 be kept confidential pending rehearing. One of the reasons expressed by the parties seeking a stay is that the material to be submitted is claimed to be confidential, and we expressly provided in our order that said information would be placed in the public files. This issue is presently being considered by us in our deliberations on rehearing.

Under the provisions of our order, prior to the issuance of our final order on rehearing intrastate rate information filed under the direction of Order No. 521 would be placed in the public files. Such a result would prejudice those companies that chose to comply with the provisions of Order No. 521 and favor those companies that failed to comply pending rehearing. Accordingly, material filed pursuant to Order No. 521 will not be placed by the Commission in the public files until ten days following the

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sioners (NARUC), and Certain Small Producers (Clark Fuel Producing Company, Robert Mosbacher, *et al.*, Reserve Oil and Gas Co., P. R. Rutherford, P. R. Rutherford, Jr., Michael Rutherford, and Wrightsman Investment Company).

[2] Requests for a stay were submitted by: Union, Mobil, Exxon, Superior, Atlantic Richfield, Continental, Tenneco, TransOcean, NARUC, and Certain Small Producers.

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issuance of a final order on the petitions on rehearing.[3] Within ten days following the issuance of such order, all reports covering the period during rehearing that have been or should have been filed will be placed in our public files.

The Commission orders:

Requests by petitioners for rehearing for a stay of the effect of Order No. 521 pending rehearing and/or judicial review are hereby denied. Information submitted in compliance with Order No. 521 will not be placed in the public files until ten days following the issuance of a final order on the petitions for rehearing.

By the Commission. Commissioner Brooke, joined by Commissioner Moody, dissenting, would stay Order No. 521 until ten days after issuance of any final order on rehearing to assure confidentiality of data pending judicial appeal, if any.

(SEAL)

Kenneth F. Plumb,
Secretary.

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[3] This order is not in contravention of Section 2.72 of our Regulations which deals with the availability of data acquired by staff investigation. Our order of August 23, 1974 in Docket No. RM74-24, which modified Section 2.72, made it clear that that order, Order No. 509, applied only to contested cases where the information sought to be kept confidential was acquired through a staff investigation. Order No. 521 is clearly not a staff investigation, since the material to be submitted by the companies will be filed at the direction of the Commission, nor is it a contested case, since this proceeding was begun by the Commission. Therefore, Section 2.72 does not apply to the instant proceeding.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
William L. Springer, and
Don S. Smith.

Investigation Of Rates Charged For Nonjurisdictional Sales Of Natural Gas By Natural Gas Companies Subject To The Jurisdiction Of The Federal Power Commission	Docket No. RM74-12

ORDER NO. 521-B

ORDER CLARIFYING ORDER NO. 521 AND DENYING HEARING

(Issued March 17, 1975)

On January 30, 1974, we issued a notice of proposed rulemaking for the purpose of establishing a data collection system designed to investigate rates charged by jurisdictional natural gas companies for sales of natural gas which were not subject to Commission jurisdiction made pursuant to contracts executed on or after January 1, 1974. Following the receipt and consideration of many comments by interested parties, the Commission issued an order on January 9, 1975, promulgating Section 260.20 of our Regulations to implement the provisions set forth in the notice of proposed rulemaking. Petitions for rehearing were filed by Union Oil Company of California, Texaco Inc., Atlantic Richfield Company, Mitchell Energy Corporation, Continental Oil Company, California Company, a Division of Chevron Oil Company, Mobil Oil Corporation, Exxon Corporation, Superior Oil Company, Mapco, Inc., Cities Service Oil Company, Tenneco Oil

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Company, TransOcean Oil Inc., Certain Small Producers,[1] and the National Association of Regulatory Utility Commissioners (NARUC). Union, Mobil, Exxon, Superior, Atlantic Richfield, Continental, Tenneco, TransOcean, Certain Small Producers, and NARUC also requested a stay of the implementation of Order No. 521. By order issued February 10, 1975, rehearing was granted for purposes of further consideration. An order issued February 19, 1975, denied the requests for a stay of the effect of Order No. 521 but granted confidentiality to material filed pursuant to Order No. 521 until ten days after the issuance of a final order on rehearing.

Certain of the matters raised by the petitions for rehearing concerning definitional problems and procedural difficulties have merit and will be dealt with herein. All other grounds for rehearing presented by petitioners, such as those relating to the legal authority of the Commission to issue Order No. 521 and the question of confidentiality of the submitted data, are denied.

CLARIFICATIONS OF ORDER NO. 521

Order No. 521 created three reporting categories for natural gas companies subject to our jurisdiction dependent upon the total annual jurisdiction sales of each company. Generally, a producer that sold less than 1.0 Bcf was exempt, those selling between 1.0 and 10.0 Bcf would report quarterly, and producers selling in excess of 10.0 Bcf annually would report monthly on Form 45. Some confusion has arisen, however, with respect to the reporting requirements of those companies that are designated as small producers pursuant to Section 157.40 of the Regulations

[1] Clark Fuel Producing Company, Robert Mosbacher, *et al.* Reserve Oil and Gas Co., P. R. Rutherford, P. R. Rutherford, Jr., Michael Rutherford, and Wrightsman Investment Company.

under the Natural Gas Act (19 CFR § 157.40). Small producers must comply with Order No. 521 according to their respective total annual jurisdictional sales. A small producer that sells less than 1.0 Bcf annually is exempt, while sales of between 1.0 and 10.0 Bcf require reporting to the Commission. Since no small producer can, by the definition set out in Section 157.40, sell in excess of 10 Bcf annually, that category is not affected.

Another question of a definitional nature is whether a company that also has affiliates and subsidiaries who also make sales of natural gas should report as a single entity. We find that a single report of total company sales is in the public interest. The tripartite reporting categories discussed previously were created so that producers with the least amount of jurisdictional sales bore the smallest reporting burden. This purpose would be defeated, and the paperwork increased unnecessarily, if affiliated companies reported other than on a consolidated basis.

A question has been presented by Chevron and Cities Service as to when a "new sale" has commenced for the purposes of Order No. 521. We agree with the suggestion of Chevron that a "new sale" should be considered made as of the date of execution of the contract covering said sale. Where no such sales are made during any reporting period, no report should be made to the Commission. Similarly, Order No. 521 requires the reporting of only "new" sales; therefore, each sale should be reported only once.

Atlantic Richfield, Cities Service, and Mobil have requested that sales made under percentage sales arrangements, and pursuant to contracts to which a producer is not a party, be exempt from reporting since these sales will be reported by the plant operator or the principal party anyway. We find merit in this suggestion, but only

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in the event the plant operator and/or signatory is a jurisdictional company that is required under Order No. 521 to report the sale to the Commission. If the plant operator or signatory is exempt from reporting, either because its annual jurisdictional sales are less than 1.0 Bcf annually, or because it is not a jurisdictional company, the jurisdictional percentage sales producer and/or nonsignatory must report the sale pursuant to the provisions of Order No. 521.

We find that the above delineated clarifications are in the public interest since all concerned parties, including the consuming public, will now have a clearer understanding of what is required by Order No. 521, but without altering the substantive provisions thereof.

LEGAL AUTHORITY

All of the parties that petitioned for rehearing claim that the Commission lacks the authority under the Natural Gas Act to require jurisdictional companies to submit to this Commission information on their nonjurisdictional sales as set forth in Order No. 521. In that order we dealt at length with this issue, and despite the assertions of petitioners we affirm our determination that Sections 5, 8, 10, 14, 15, and 16 provide ample authority for the action taken in Order No. 521.

Without repeating the statements made by us in Order No. 521, we wish to respond to two specific points respecting our legal authority. The first is a procedural question relating to compliance with the Federal Reports Act,[2] and the second issue concerns the interpretation of Section 14(a)[3] of the Natural Gas Act.

Mitchell, Superior and Mobil assert that the Commission has, in some manner, not complied with the Federal

[2] 44 U.S.C. § 3501, *et seq.* (1969).
[3] 15 U.S.C. § 717m (1970).

Reports Act. The relevant section of this law[4] provides that when an independent regulatory agency seeks to collect information upon an identical item from ten or more persons, that agency must submit to the Comptroller General of the United States the form intended to be used together with the pertinent regulations. The Comptroller General is obligated to determine that the information can be obtained with a minimum burden and that there is no unnecessary duplication of reporting to Federal agencies.

It is asserted that the Commission failed to comply with this provision or, at a minimum, failed to state its compliance in Order No. 521, despite the notation on Form 45 that it has been approved by the General Accounting Office (Comptroller General). The actions of an administrative agency are presumed valid,[5] but for the purpose of clarification we will detail our actions with respect to the Federal Reports Act.

On November 15, 1974, the Commission submitted to the Comptroller General the following: a clearance form (Standard Form 83) and supporting statement, the Notice of Proposed Rulemaking, the proposed order and form, and a notice to appear in the Federal Register. Upon completion, the dissent of Commissioners Moody and Brooke was also transmitted to the Comptroller General. In its statement of justification the Commission gave the reasons for the promulgation of the new reporting requirement, a descripion of the form to be used, from whom the data would be collected, and that the reports submitted would be placed in the public files. The statement also noted the efforts of the Commission to obtain outside comment and

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[4] 44 U.S.C. § 3512 (1973), Pub. L. No. 93-153, 1st Sess. 93rd Cong., § 409 (1973).

[5] *FPC* v. *Hope Natural Ga sCo.*, 320 U.S. 591, 602, (1944).

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that these comments were available for inspection in the Commission's public files, that the burden of compliance with the proposed order was slight, and that the information sought was not reported elsewhere on a comprehensive basis.

A notice of the request for clearance appeared in the Federal Register on November 26, 1974, at 39 F.R. 41313, inviting comments from all interested parties. Only Atlantic Richfield submitted a comment to the Comptroller General. On December 30, 1974, the Comptroller General informed the Commission that the proposed form was approved as of that date. That finding represents a determination that the Commission had complied with the provisions of the Federal Reports Act in its promulgation of Order No. 521.

Petitioners herein, especially Mobil, now seek to overturn Order No. 521 by alleging that the Commission obtained approval from the Comptroller General under false pretenses, alleging, essentially, that the statement of justification submitted by us to the Comptroller General was not truthful. This assertion is nothing less than a collateral attack upon the express finding made by the Comptroller General approving the form[6] and as such will not be entertained through a petition for rehearing, especially since Mobil did not see fit to even respond to the invitation that appeared in the Federal Register to submit comments. We stand upon the decision by the Comptroller General that the form accompanying Order No. 521 complies with the requirements of the Federal Reports Act.

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[6] In a letter written on behalf of the Comptroller General dated January 23, 1975, and received by us on January 28, 1975, confirming the verbal approval of October 30, 1974, it is stated that:

> [b]ased on our review, we believe that the information being requested is not available from other Federal sources and that the burden on respondents is not excessive. Therefore, we believe the form is consistent with the provisions of the law and do not object to its use.

The second allegation concerning our legal authority to which we will respond herein relates to the interpretation of Section 14(a) of the Natural Gas Act.[7] We relied, in part, upon Section 14(a) as authority for the issuance of Order No. 521. Section 14(a) provides that:

> [t]he Commission may investigate any facts, conditions, practices, or matter which it may find necessary or proper in order . . . to aid in the enforcement of the provisions of this act or in prescribing rules or regulations thereunder . . .

Certain of the petitioners and the dissenting Commissioners contend that this provision does not support the instant investigation of jurisdictional companies because it does not contain the same grant of authority as that of its companion part in the Federal Power Act, Section 311.[8]

Section 311 states that:

> [i]n order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, *whether or not otherwise subject to the jurisdiction of the Commission* . . . (emphasis added)

Pursuant to this provision, the Commission can collect required information from both jurisdictional and non-jurisdictional electric companies. Petitioners contend that the absence of this authorization from Section 14(a) of the Natural Gas Act prohibits the action taken in Order No. 521; also, that the Commission has acknowledged this

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[7] 15 U.S.C. § 717m (1970).
[8] 16 U.S.C. § 825j (1970).

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limitation for over twenty years in its Annual Report to Congress. We disagree. Section 14(a) fully supports our position as expressed in Order No. 521 and the determinations expressed in that order do not constitute a reversal of Commission policy.

In its 1973 Report to Congress the Commission stated that it:

> . . . continues to support the adoption of legislation . . . which would *enlarge* the Commission's authority under the Natural Gas Act to collect, publish and disseminate information with respect to the natural gas industry comparable to that which it already possesses regarding the electric utility industry under the Federal Power Act.[9] (emphasis added)

The Commission's proposal requests that its jurisdiction be enlarged in order to permit the collection of information from nonjurisdictional natural gas companies in the same manner as Section 311 of the Federal Power Act gives the Commission authority to obtain information from nonjurisdictional electric facilities. Such an extension of authority would appear to require an amendment to the Natural Gas Act, but that argument has no relevance to Order No. 521 since no such expansion is sought therein.

The purpose of Order No. 521 is to obtain from *jurisdictional* companies information which petitioners acknowledge will be helpful in fulfilling our ratemaking responsibilities. We did not in Order No. 521 attempt to regulate nonjurisdictional sales or in any other way undertake any action not fully supported by the grants of authority already present in the National Gas Act. It is not necessary in order to realize the purposes of Order No. 521 for the

[9] Fifty-third Annual Report of the Federal Power Commission, p. 7, (1973).

Commission to await amendment of the Act since our order applies only to those companies that are admittedly under our jurisdiction for purposes that are clearly within the purview of our regulatory responsibility.

In the *Permian Basin Area Rate Case*[10] the Supreme Court directed us that:

> [t]he Commission's responsibilities necessarily oblige it to give continuing attention to values that may be reflected only imperfectly by producer's costs; a regulatory method that excluded as immaterial all but current or projected cost could not properly serve the consumer interests placed under the Commission's protection.[11]

Order No. 521 is an attempt to comply with the requirement to consider factors other than costs that directly affect our ratemaking obligations under the Natural Gas Act by providing the Commission with vital information which can best be obtained from the natural gas companies subject to our jurisdiction.

The grant of authority inherent in the Natural Gas Act is sufficient to justify our action in Order No. 521. Petitioners' arguments presented in their comments on the Notice of Rulemaking and in the petitions for rehearing are not compelling. We stand upon Sections 5, 8, 10, 14, 15, and 16 of the Natural Gas Act as the legal basis for the issuance of Order No. 521 and the contentions by the petitioners to the contrary are hereby denied.

CONFIDENTIALITY

All petitioners assert that should the Commission's authority be determined to include procuring intrastate rate information from jurisdictional companies, the data

[10] 390 U.S. 747 (1960).
[11] *Id.* at 815.

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collected should be kept confidential. The methods suggested are for the Commission to retain the information in its files for internal use, as was done under Docket No. R-389-A, or, if release to the public is required, organize the data in composite form omitting the names of the relevant companies.

Petitioners claim a proprietary interest in the requested information, on their own behalf and also that of the purchaser. Also, it is argued that release of this information will adversely affect both the inter and intrastate markets, that litigation by royalty owners against producers will be increased, that public disclosure violates both the due process clause of the Constitution and the Freedom of Information Act,[12] and that the requested information is available from other sources.

It is difficult for us to understand the relevance of petitioners' claim of confidentiality when they also assert that the data required by Order No. 521 is presently available to the public from state regulatory agencies[13] or through the media. In the appendices to its petition for rehearing Mobil provides examples of a tax report submitted to the State of Texas and news media reports of intrastate sales, both of which state the names of the seller and purchaser, the location of the sale, the price per Mcf, and, in some cases, the term of the contract, the daily delivery rate, quality adjustments, and information on any price redetermination clauses. Form 45, as promulgated by Order No. 521 and approved by the Comptroller General, seeks no additional data than that just discussed, and is, there-

[12] 5 U.S.C. § 552 (1969).

[13] Our reasons why obtaining the desired data from the state regulatory agencies was inadequate for our purposes were set forth in Order No. 521, mimeo pp. 7-8, ... F.P.C. ..... (issued January 9, 1975).

fore, not confiscatory. Petitioners cannot be heard to complain that information which is reported to state regulatory agencies for public consumption or voluntarily released to the press is somehow also confidential, proprietary data.

In light of the statements of petitioners that the requested information is presently available through a multiplicity of sources, the objection of petitioners to Order No. 521 can only be that it would provide a comprehensive reporting system encompassing all intrastate sales by the subject jurisdictional companies, with the resultant information easily available to the general public in our files. Since, as the petitioners argue, this information is already in the public domain, our proposal to make the reports filed pursuant to Order No. 521 available to the public can hardly be objectionable.

REGULATORY PURPOSE

Several petitioners have asserted that we did not in Order No. 521 express a valid regulatory purpose to support the investigation of intrastate rates undertaken therein. We disagree. The reasons for the issuance of Order No. 521 are clearly set forth in that order and need not be repeated. However, solely for purposes of clarification, a brief restatement of our basic position may be helpful.

The Federal Power Commission is a public agency created by the Congress because of their express finding that:

> . . . the business of transportation and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas

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> and the sale thereof in interstate and foreign commerce is necessary in the public interest.[14]

We are attempting to carry out this mandate through Order No. 521, including the release of the information to the public.

In Order No. 521 we stated that one possible use for the data to be supplied by Form 45 was to assist us in the review of rates proposed for limited term and emergency sales.[15] Petitioner Mobil contends that this statement implies that producers in limited term proceedings have proffered false exhibits or offered witnesses to testify untruthfully in order to meet the burden of proof that the rate proposed is the lowest necessary to attract the supply to the interstate market.[16] The inference drawn by Mobil is not correct.

We have required producers in limited term certificate proceedings to demonstrate, by comparison with intrastate sales, that the proposed price is necessary to obtain the gas supply for the interstate market.[17] In order to meet this burden of proof it is necessary to canvas the available information and choose which transactions best exemplify the intrastate market in that particular area. Obviously, reasonable minds may differ as to which sales are representative. Further, much of the intrastate information nec-

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[14] 15 U.S.C. § 717(a) (1970).

[15] Order No. 521, Docket No. RM74-12, mimeo at 3-4, ... FPC ..... (issued January 9, 1975).

[16] Opinion No. 699-B, Docket No. R-389-B, mimeo at 6, ... FPC ..... (issued September 9, 1974).

[17] Opinion No. 699-B at mimeo 4 provides that for an emergency sale the pipeline will be permitted to pay what "a reasonably prudent pipeline purchaser would pay for gas under the same or similar circumstances." This standard for review appears to be similar to that for a limited term certificate.

essary to provide a reliable indicator of local market prices may not be obtainable by a single producer from other producers in the area, or, if such information is obtained, it might only be possible after extensive and expensive investigation and the risk of a charge of anti-competitive conduct.

Order No. 521 will resolve that difficulty. The information submitted on Form 45 will provide a comprehensive data base upon which all parties in limited term proceedings, both proponents and opponents, can draw so that the burden of proof imposed on the producers by Opinion No. 699-B can be tested by all concerned, including the Commission, on the basis of the best possible information. Therefore, contrary to the assertion of Mobil, Order No. 521 is not an expression on our part of lack of faith in the honesty of producer submittals under oath in proceedings before this body, but rather an attempt to assist all concerned with the limited term procedure to adequately test the burden of proof and to assure the parties that the decision of the Commission will rest upon a consideration of the best available information.

Besides assisting us in the review of limited term and emergency sales, the information to be submitted on Form 45 will, as we stated in Order No. 521,[18] assist us in judging the effect our ratemaking efforts have on the dedication of new gas supplies to the interstate market. The information we require in Order No. 521 will tell us, not only the current prices being paid in the intrastate market, but also the amount of reserves dedicated, the length of the term of the contract, and whether there are any renegotiation provisions in the contract. With this data base

[18] Order No. 521, mimeo at 7.

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we will be able to ascertain the effectiveness of our various ratemaking policies, such as the nationwide rate, the optional procedure, limited term certificates, and emergency sales provisions, in procuring needed gas reserves for the interstate market.

It clearly is proper for the Commission to consider non-cost factors, such as intrastate market prices, in the establishment of a just and reasonable rate for producers.[19] Order No. 521 is an effort, within the authority granted us by the Natural Gas Act, to obtain as much information as possible on the nature and extent of the current intrastate market, which is the principal competitor for the sources of gas so vital to the interstate consuming public that depend upon us for the protection of their source of supply at a reasonable price.[20]

Accordingly, claims by petitioners that there is no valid regulatory purpose to the collection of the data required to be submitted pursuant to Order No. 521 are without merit and are denied.

The Commission finds:

Petitioners' applications for rehearing present no new fact or principles of law which were not fully considered in Order No. 521 or, which having now been considered, warrant the rescission or any modification of Order No. 521.

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[19] *Texaco* v. *F.P.C.*, 417 U.S. 380, 398-400 (1974). *See also, Southern Louisiana Area Rate Cases* (*Austral Oil Co.*) v. *F.P.C.*, 428 F.2d 407, 441-42 (5th Cir. 1970), *cert. denied, Municipal Distributors Group* v. *F.P.C.*, 400 U.S. 950 (1970); *Permian Basin Area Rate Cases,* 390 U.S. 747, 815 (1960).

[20] *F.P.C.* v. *Hope Natural Gas Co.,* 320 U.S. 591, 611 (1944).

The Commission orders:

The petitions for rehearing filed by all parties in this proceeding are denied.

By the Commission.

(S E A L)

Mary B. Kidd,
Acting Secretary.

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APPENDIX F

NATURAL GAS ACT

[PUBLIC — No. 688 — 75TH CONGRESS]
[CHAPTER 556 — 3D SESSION]
[H.R. 6586]

AN ACT

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821 (1938); 15 U.S.C. § 717 (a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used

for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)]

(c) The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U.S.C. § 717 (c)]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or

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contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d]

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communi-

ties immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. § 717f(a)]

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. [52 Stat. 824 (1938); 15 U.S.C. § 717f(b)]

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this

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amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served upon such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f(c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization. [56 Stat. 84 (1942); 16 U.S.C. § 717f (f)]

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(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company. [56 Stat. 84 (1942); 15 U.S.C. § 717f (g)]

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. [61 Stat. 459 (1947); 15 U.S.C. § 717f (h)]

ACCOUNTS, RECORDS, AND MEMORANDA

SEC. 8. (a) Every natural-gas company shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appro-

priate for purposes of the administration of this act: *Provided, however,* That nothing in this act shall relieve any such natural-gas company from keeping any accounts, memoranda, or records which such natural-gas company may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

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(c) The books, accounts, memoranda, and records of any person who controls directly or indirectly a natural-gas company subject to the jurisdiction of the Commission and of any other company controlled by such person, insofar as they relate to transactions with or the business of such natural-gas company, shall be subject to examination on the order of the Commission. [52 Stat. 825 (1938); 15 U.S.C. § 717g]

(b) The Commission, before prescribing any rules or requirements as to accounts, records, or memoranda, or as to depreciation or amortization rates, shall notify each State commission having jurisdiction with respect to any natural-gas company involved and shall give reasonable opportunity to each such commission to present its views and shall receive and consider such views and recommendations. [52 Stat. 826 (1938); 15 U.S.C. § 717h]

PERIODIC AND SPECIAL REPORTS

SEC. 10. (a) Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this act. The Commission may prescribe the manner and form in which such reports shall be made, and require from such natural-gas companies specific answers to all questions upon which the Commission may need information. The Commission may require that such reports shall include, among other things, full information as to assets and liabilities, capitalization, investment and reduction thereof, gross receipts, interest due and paid, depreciation, amortization, and other reserves, cost of facilities, cost of maintenance and operation of facilities for the production, trans-

portation, or sale of natural gas, cost of renewal and replacement of such facilities, transportation, delivery, use, and sale of natural gas. The Commission may require any such natural-gas company to make adequate provision for currently determining such costs and other facts. Such reports shall be made under oath unless the Commission otherwise specifies.

(b) It shall be unlawful for any natural-gas company wilfully to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, memorandum, record or account required to be made, filed, or kept under this act or any rule, regulation, or order thereunder. [52 Stat. 826 (1938); 15 U.S.C. § 717i]

INVESTIGATIONS BY COMMISSION; ATTENDANCE OF WITNESSES; DEPOSITIONS

SEC. 14. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this act or in prescribing rules and regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 312 of the Federal Power Act, and make available to State commissions and municipalities, information concerning any such matter.

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(b) The Commission may, after hearing, determine the adequacy or inadequacy of the gas reserves held or controlled by any natural-gas company, or by anyone on its behalf, including its owned or leased properties or royalty contracts; and may also, after hearing, determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases. For the purpose of such determinations, the Commission may require any natural-gas company to file with the Commission true copies of all its lease and royalty agreements with respect to such gas reserves.

(c) For the purpose of any investigation or any other proceeding under this act, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(d) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other

records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(e) The testimony of any witness may be taken at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his disposition. Any person may be compelled to appear and depose,

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and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(f) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(g) Witnesses whose depositions are taken as authorized in this act, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(h) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punish-

ment for perjury committed in so testifying. [52 Stat. 828 (1938); 15 U.S.C. § 717m]

HEARINGS; RULES OF PROCEDURE

SEC. 15. (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this act. [52 Stat. 829 (1938); 15 U.S.C. § 717n]

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in

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this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]

REHEARING; COURT REVIEW OF ORDERS

SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought

by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce

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additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order. The judgment and decree of the court, affirming, by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r]

APPENDIX G

§ 825j. Investigations relating to electric energy; reports to Congress

In order to secure information necessary or appropriate as a basis for recommending legislation, the Commission is authorized and directed to conduct investigations regarding the generation, transmission, distribution, and sale of electric energy, however produced, throughout the United States and its possessions, whether or not otherwise subject to the jurisdiction of the Commission, including the generation, transmission, distribution, and sale of electric energy by any agency, authority, or instrumentality of the United States, or of any State or municipality or other political subdivision of a State. It shall, so far as practicable, secure and keep current information regarding the ownership, operation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

June 10, 1920, c. 285, § 311, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 859.

BLEED THROUGH